20839

THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

Privy Council	...	... J. V. WOODMAN, *Middle Temple.*
High Court, Allahabad	...	... W. K. PORTER, *Gray's Inn.*

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JUDGES OF THE HIGH COURT.

CHIEF JUSTICE.

THE HON'BLE SIR JOHN STANLEY, KT.

PUISNE JUDGES.

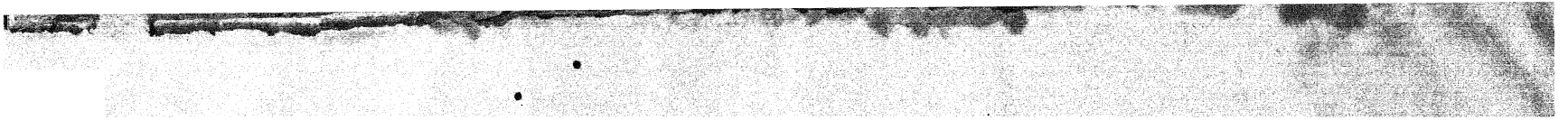
THE HON'BLE MR. JUSTICE G. E. KNOX.

" " " H. F. BLAIR.

" " " P. C. BANERJI.

" " " W. R. BURKITT. *On furlough in India from 26th May 1902 to 24th July 1902.*

" " " R. S. AIKMAN.



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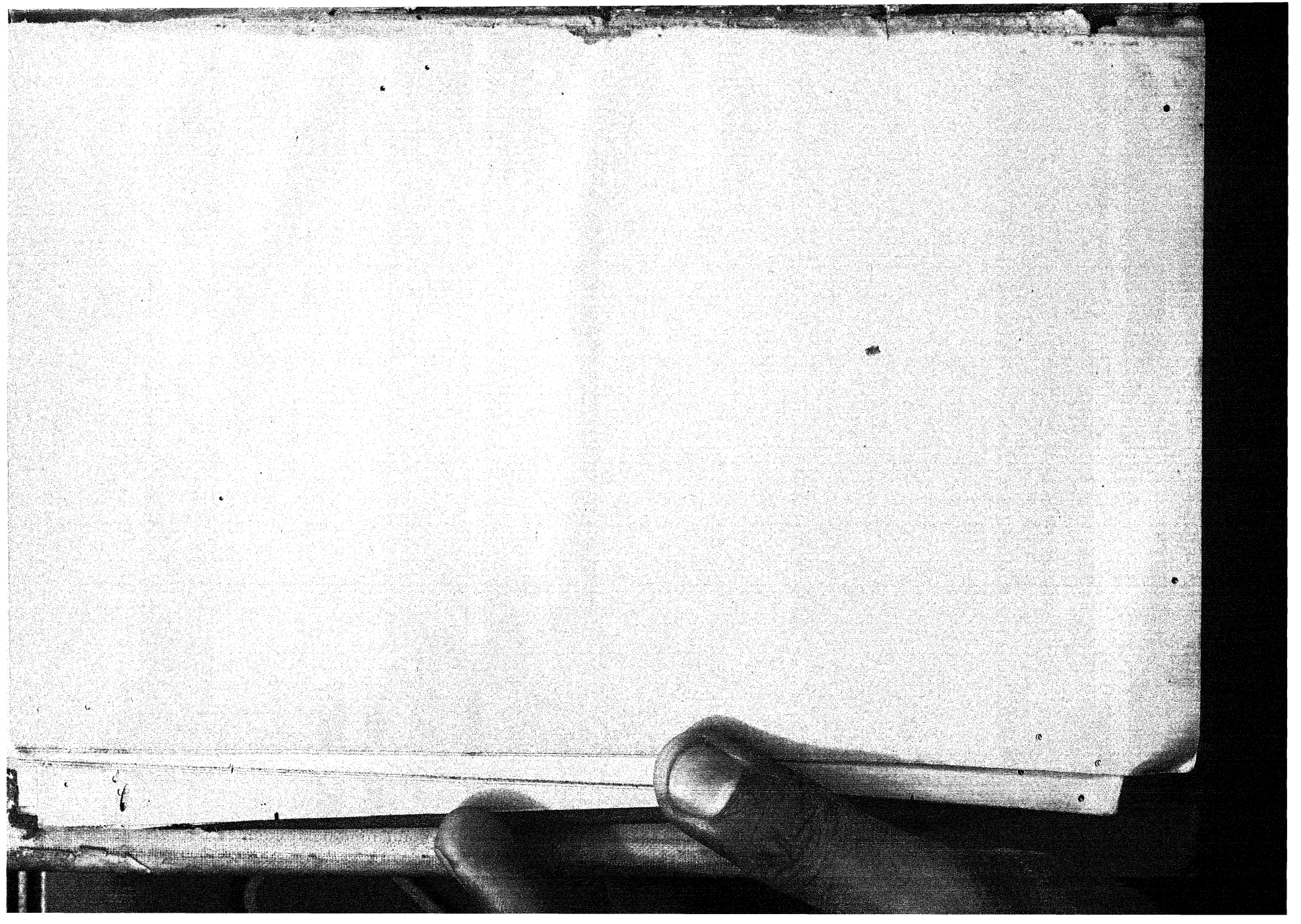
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PRIVY COUNCIL.

P. C.
J. C.
1901
February 28.
May 11.

MAQBUL HUSAIN AND ANOTHER, APPELLANTS *v.* LALTA PRASAD, RESPONDENT.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Construction of a Government order—Release of nazul property—Limitation.

The proprietary right in the site of a bazar, and interests in the houses thereon, were disputed between the zamindar claiming them, and the resident occupiers, whose rights by agreement were to be determined by the decision in the case of the defendant who was one of them. In 1879 the Government released the bazar from the nazul, it having been entered in the District Register of that property in 1860.

In the written order of Government sanctioning the withdrawal of the entry in the Register there were words as to the effect of which the Courts below differed; the Court of first appeal holding that the release was to the zamindar, the Court of second appeal holding that the occupiers of the houses were severally made proprietors of them. The words were "as the occupiers appear to have all along exercised proprietary rights without question of their power to do so, it is now too late to disturb their status."

Held, that the intention of the Government, as shown, was merely to annul the entry in the Register, and to restore the rights which existed when the entry had been erroneously made. More importance was attached to the act of the Government than to the words used in their order. The effect was a disclaimer of title and a release to those who would have been entitled but for the confiscation by the act of State of 1858; thus following out the policy at the general settlement of Oudh lands. There was no intention to benefit one party more than the other, or to confer title upon either as against the other, in this release.

Held, also, that limitation did not apply. Before the annexation of the province there was no limitation causing either bar of suit or title to accrue. So long as the ownership was in the Government, and till the release, neither party had any interest to enforce. The earliest date from which limitation could commence was the date of the release.

Present:—LORDS HOBHOUSE, DAVEY, and LINDLEY, SIR RICHARD COUCH and SIR FORD NORTH.

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On questions not yet disposed of below as to the titles of the parties, irrespectively of those supposed to have been conferred by the order of 1879, and as to the claim in regard to the materials, the suit was remanded to the first Court for trial upon issues.

An official report forwarded with the application for sanction of the release of the property from the nazul was referred to as showing the materials which the Government had before them for deciding to act as they did.

APPEAL from a decree (3rd June, 1897) of the Judicial Commissioner, reversing a decree (26th February, 1895) of the District Judge of Hardoi, and restoring a decree (30th August, 1894) of the Subordinate Judge who had dismissed the plaintiff's suit.

The appellants were the sons and successors in estate of Chaudhri Abdul Baki, a zamindar of Ashraftola in the town of Sandila, who filed this suit on the 12th of May, 1890, and died while it was pending. The claim was for the proprietary possession of the site of, and an interest in, two houses occupied as shops in Amaniganj bazar in that town. The defendant was a grain dealer occupying them. He had built a third of which the materials were now claimed.

The town of Sandila came within the general confiscation under the act of State of the 26th of March, 1858. Property other than the bazar, was restored to the Chaudhri family afterwards; but in 1860, Amaniganj bazar was entered in the Nazul Register of the Hardoi district, the bazar being then erroneously believed to have been the property of the ex-King of Oudh. In March, 1877, the assessment of a ground rent was ordered by the Deputy Commissioner, but was not paid.

On the 3rd of September 1877, the present plaintiff petitioned the Deputy Commissioner to order an executive inquiry into his claim for the proprietary right to the bazar as against the title of the Government. On the 20th of July 1878, the Tahsildar, after taking the evidence of some of the resident occupiers and others purporting to have knowledge of the facts, sent a report on the case. This was forwarded on the 1st of March, 1879, to the Government by the Deputy Commissioner. The particulars of this, with all the facts relevant to the appeal, are stated in their Lordships' judgment.

On the 26th of May, 1879, the order sanctioning the application that the entry of bazar in the Register should be withdrawn was

sent to the above officer through the Commissioner of the Sitapur Division (within which Hardoi was then comprised). The Government letter stated that as the occupants appeared to have all along exercised proprietary rights without question of their power to do so, it was now too late to attempt to disturb their status.

The bazar having been released from the nazul, Abdul Baki instituted suits after the lapse of some years. In 1890 he sued thirty-seven occupiers of whom the defendant was one.

The main question on this appeal was as to the effect on the rights of the parties of this act of release by the Government. The plaintiff-appellant, and the thirty-six other occupiers, had consented to abide by the decision in the case of the present defendant.

The plaint stated that the plaintiff had title to the bazar by ancestral right, that the houses were built by those who lived there as ryots, the defendant occupying two, and having built another without permission; and that since the release of the bazar from the nazul, all the ryots had been rendering zamindari dues to the plaintiff, in favour of whom the release had been made, and who had since then had possession. A custom of the town was that the materials of a house left by a ryot of his own accord became the zamindar's and that on the ryot's selling a house he paid one-fourth of the price to the zamindar; who, if he made the occupier quit, paid to him three-fourths of the estimated price. The claim was for possession of the two houses on payment by the zamindar of three-fourths of the value of the materials. Those of the other house were claimed without payment.

The defendant's written answer denied that the site was ever the ancestral property of the plaintiff and that the defendant had ever paid zamindari dues, he and his predecessors having been in free possession for upwards of a hundred years. Limitation was also pleaded. It was added that no such custom about the materials existed and that it was not the fact that the bazar was made over to the plaintiff from the Nazul Department, also that the bazar was released because no one ever paid dues in respect of it.

The issues related to whether the plaintiff had the title alleged by him and whether the bazar was re-leased to him in

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1879; whether he had since been in possession receiving zamindari dues; whether limitation was applicable; whether the custom was as stated, and what was the price to be paid in respect of the materials if the plaintiff should be found entitled as he alleged.

The Subordinate Judge dismissed the suit. His judgment passed over the question of the plaintiff's right by ancestral title. He was of opinion that nothing had been granted or allowed to the plaintiff on the release of the bazar from the nazul by the order of Government, and that therefore he had no interest in the property. In effect he found that the grant was to the resident occupiers and not to the Chaudhri zamindars. He also held that the suit failed because it was barred by limitation under Article 142, Schedule II, Act No. XV of 1877.

The District Judge on the plaintiff's appeal reversed the above decision. He was of opinion that by "occupants" the Government order of the 26th of May, 1879, meant the zamindar. The circumstances of the case made it clear to him that the expression was used in this sense. No question had been raised between the Government and the resident occupiers when the letter of that date was written It had then not yet been asserted that the occupiers had the proprietary right to the land on which the bazar stood. The only question that had been raised with them was whether they were liable to pay rent; and that question was left in abeyance by the local authorities until it should have been decided whether the Government or Abdul Baki should be the recognised proprietor. The District Judge found for these reasons that the plaintiff was the proprietor. He held that the suit was not barred by time. He remanded it for decision upon the issues not decided by the first court as to the rights of the parties in the materials of the houses and their estimated price

The defendant then appealed to the Judicial Commissioner, who reversed the decree of the District Judge, and restored that of the Subordinate Judge, dismissing the suit. He was of opinion that the Government order of 1879 referred to the "occupants" of the houses. He would not construe that order, by the aid of the Deputy Commissioner's letter of the 1st of March, 1879, as referring to the zamindars, and as conferring the proprietary title to the bazar Amaniganj on the plaintiff.

Mr. *L. DeGruyther*, for the appellants, argued that the Judicial Commissioner had misconstrued the order of the 26th of May 1879, and that he was wrong in holding that the plaintiff had failed to prove his title to the site of the bazar. The Judicial Commissioner had considered that the order placed the property at the disposal of the occupants, whose status was not to be disturbed, and he construed that term to mean the resident occupiers. The District Judge had taken the correct view that the word referred to the zamindar, finding that the circumstances justified this interpretation. It was submitted that the recommendation of the Deputy Commissioner on the 1st of March, 1879, on which the Government had acted, could only refer to the recognition of the title of the zamindar as against the claim of the Government. It could not mean a recognition of a proprietary right in the occupiers who had then claimed no such title; whose rights had not been investigated, and who were referred to on any view of the subject-matter, by a doubtful expression. It was argued that the word "occupants" referred to the zamindars who were Abdul Baki and his ancestors. The latter had all along exercised enough proprietary rights to show that such rights existed. The occasion, the documentary evidence, and the order of 1879, were all such as to show that the object of the Government was to restore the state of things which existed before the events leading to the entry in the Nazul Register. It was within the power of the Government to grant or to withhold the title. Reference was made to the judgment in *Nawab Malka Jehan Sahiba* v. *The Deputy Commissioner of Lucknow* (1), showing that all who claimed property that had fallen within the confiscation of 1858, must claim through the Government in whom it had vested.

The respondent did not appear.

On the 11th May their Lordships' judgment was delivered by LORD DAVEY.

This is an appeal from the decree of the Judicial Commissioner of Oudh of the 3rd of June, 1897, reversing the decree of the District Judge of Hardoi of the 26th of February, 1895, and restoring the decree of Subordinate Judge of Hardoi of the 20th of August, 1894, which dismissed the suit of the plaintiffs and

(1) (1879) L. R., 6 I. A., 63, at p. 74.

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present appellants. The respondent has not appeared, which their Lordships regret the more because it is stated to be a test case upon the decision of which 36 similar cases will depend. It is surprising that the 37 defendants did not combine to instruct counsel to argue their case at their Lordship's Bar.

The appellants are the heirs of the original plaintiff Chaudhri Abdul Baki who by his plaint claimed to be entitled to the land or soil occupied by a bazar called Amaniganj in the town of Sandila in Oudh as his ancestral property. It was alleged that the residents of the said bazar live there as ryots, having built houses at their own costs, and that the defendant was one of such residents in occupation of two shops and having without permission built another shop on a piece of fallow. The plaint contains an allegation of a custom in the town of Sandila that if a ryot leaves of his own accord a house or shop occupied by him the materials thereof become the property of the zamindar. If he wishes to sell the materials of a house or shop he pays one-fourth of the price to the zamindar and if the zamindar desires the ryot to vacate a house or shop he pays the ryot three-fourths of its estimated price. The prayer is for possession of the land occupied by the defendant subject to the payment of three-fourths of the price of the defendant's shops (other than the one erected without permission) according to the custom.

The defence is in substance a denial of the plaintiff's title and a plea of limitation.

After the mutiny the town of Sandila shared the general confiscation of Oudh territory. Other family property was restored to the plaintiff, but in 1860 the bazar was entered in the Nazul Register under the belief (which appears to have been mistaken) that it was previously the property of the King of Oudh. In the year 1877 the Government determined to impose the payment of a ground rent upon the occupiers. The occupiers refused to pay, apparently on the ground that they were not liable by their tenure to pay rent, and the Tahsildar was ordered to institute a test action. Before anything was done, however, an inquiry was directed to be made as to when and by whom the shops were built, how did they become a nazul property, and what proof there was of their being such. On

the 3rd of September, 1877 Abdul Baki (the plaintiff) petitioned the Government "that an executive inquiry be made through "the Tahsildar or some other officer, and if the bazar be found "to be the petitioner's property an order for its release be "passed," and an inquiry was directed accordingly.

The report of the Tahsildar by whom these inquiries were conducted is dated the 20th of July, 1878. It is a lengthy document and contains a history of the case. He reported that the entry in the register was the only proof of the bazar being nazul, and that with regard to the proprietorship of the bazar there was no contradiction to the Chaudhris being the owners of it, whose heirs were Abdul Baki and others. And he also found that although payment of rent in money or of two pice and betel at the construction of a new shop had not been stated by any witness, yet no one denied the proprietorship of the petitioner and his ancestors, and the payment of other dues was also admitted.

On the 1st March, 1879, the Deputy Commissioner of Hardoi forwarded to the Commissioner the following docket as to "the Nazul Amaniganj":—

"Sir,

"Certain shops in Sandila, known as Amaniganj, are in the Nazul "Register. Last year I imposed a light ground rent on them, and the rent "not being paid, threatened to sue.

"Petitions of objections were lodged, first, by the zamindars, who claimed "that the proprietary right was theirs; secondly, by Musammat Lado, who "claimed a portion of the property as hers. A very careful inquiry has been "held on the spot by the Tahsildar in each case. I forward translations of his "reports.

"2. The result may be summed up as follows:—

"I. That the bazar was built 80 or 90 years ago and was called after "the reigning King, but no one can say who built it.

"II. That the zamindars hold:—

"*(a)* a *mazhar* or attested statement of title;

"*(b)* a mortgage deed executed by them;

"*(c)* a deed of gift on their part in favour of Musammat "Lado, with regard to a portion of the property.

"III. That these documents are apparently genuine.

"IV. That they appear to have received presents from the owners of "shops in acknowledgment of their proprietorship up to 1860, "when the *ganj* was declared nazul.

"V. That as far as is known no proprietary rights have ever been exer- "cised or rents received either by the Kings of Oudh or by the "present Government.

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"Under these circumstances I recommend that the *ganj* (market) be "struck out of the Nazul Register. A copy of the entry in the register is "annexed.

"(Sd.) J. QUINN,
"Deputy Commissioner."

Their Lordships do not refer to these documents as evidence against the respondent of the truth of the matters stated in them, but for the purpose only of showing the materials which the Government had before it when it gave its decision in the ambiguous terms to be next stated, and the nature of the case upon which that decision was given.

On the 26th of May 1879 the Government addressed the following letter to the Commissioner of Sitapur :—

"From ROBERT SMEATON, ESQ.,
"Junior Secretary to Government, N.-W. Provinces and Oudh,
"To the Commissioner of the Sitapur Division.

"WITH reference to correspondence ending with your No. 1464, dated "10th May, regarding the removal from the Hardoi Nazul Register of certain "shops, known as Amaniganj, in Sandila, I am directed to say that as the "occupants appear to have all along exercised proprietary rights without ques- "tion of their title to do so, it is too late now to attempt to disturb their "status; and the Lieutenant-Governor and Chief Commissioner is accordingly "pleased to sanction the Deputy Commissioner's proposal to expunge these "shops from Nazul Register."

In compliance with this order the bazar was struck off the Nazul Register and proclamation made thereof.

The principal question on this appeal is what the effect was of this act of the Government? The appellants contend by their pleadings and at the bar that the letter of the 26th of May 1879 was according to its true construction and when read by the light of previous proceedings a regrant to the zamindar of the land and soil of the bazar. The respondent on the other hand relied upon the letter of the 26th of May 1879 as a grant to the occupiers of full proprietary rights in their houses and shops and the land upon which they are constructed and thus turned them from ryots and occupiers into landowners. It is of course agreed that any person claiming land in Oudh must show a title from Government subsequent to the confiscation; but the question is to whom it is to be inferred from these informal proceedings that the grant was intended to be made.

The following issues were framed by the Subordinate Judge :—

"1. Is the land on which the bazar called Amaniganj in Sandila is situate "plaintiff's ancestral property and the residents of the bazar live in it like "ryots ?

"2. Was the bazar restored in favour of the plaintiff, or given to the plaintiff, and the plaintiff has been in possession ever since, and has regularly "received or taken zamindari dues from all the tenants of the same ?

"3. When did the cause of action accrue to plaintiff, and is plaintiff's "claim within limitation ?

"4. Is there any custom prevailing in Sandila to the effect that whenever "the zamindar or owner of the land wishes to turn out any tenant living on "his land, he can do so and pay three-fourths of the value of the materials of "the tenant's house, and if so, does such custom apply or govern the bazar of "Amaniganj ?

"5. If the plaintiff be found to be entitled to the possession of the houses "and shops, what is the amount in each case on payment of which he can "obtain possession ?"

The Subordinate Judge did not think it necessary to determine the first issue because he held that the letter of the 26th of May, 1879, operated as a grant by the Government of full proprietary rights to the occupiers. He also found on the third issue that the plaintiff had not been in possession within limitation and his suit was barred by Article 142, Schedule II, of the Limitation Act.

The District Judge on appeal held that the Government in 1879 surrendered the proprietary right in the land of the *ganj* to Abdul Baki, and that he was not barred by limitation from bringing the suit, and remanded the case for trial of Issue No. 4 and, if necessary, Issue No. 5. The District Judge thought that it was clear from the history of the case that by the word "occupants" in the letter of the 26th of May 1879 was meant the zamindar. Their Lordships cannot see their way to adopting this construction. But they think that the following sentences of the learned Judge's judgment are well founded :—"It was a question "of proprietary right between Government and the zamindar. It "was not a question between Government and the shopkeepers. "It was never asserted that the shopkeepers had a proprietary "title to the land. The only question with them was whether they "could be made to pay rent and that question was left in abeyance

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"until it was decided whether Government or Abdul Baki was "the proprietor of the land."

Finally the Judicial Commissioner reversed the decree of the District Judge and restored that of the Subordinate Judge substantially for the same reasons. The Judicial Commissioner comments upon the fact that the whole of the correspondence upon which the Government Order of the 26th of May is based was not before the Court. Since the hearing before the Judicial Commissioner the appellants have obtained from Government copies of certain letters which preceded those of the 26th of May and asked leave to read them on the hearing of this appeal. But as the respondent has not appeared and it did not appear that any notice had been given to him that leave to produce fresh evidence would be asked for, their Lordships did not think fit to accede to the application, though they do not doubt their power to do so. Both sides seem to be equally in default in not obtaining earlier production of these letters.

Their Lordships are impressed by the weight of the observations which have been quoted from the judgment of the District Judge. Throughout the exhaustive report of the Tahsildar there is not a trace of any claim by any of the occupiers (of whom seven gave evidence) to the ownership of the land, but on the contrary it is expressly stated in the report that there was no denial of the title of Abdul Baki and his ancestors.

They cannot without the clearest evidence attribute to the Government any intention to adjudicate upon or decide a matter which was not before it, or gratuitously to confer title on persons who never claimed it to the prejudice of others whose claim was reported by the Government Officers to be well founded. Their Lordships attach more importance to the act of the Government than to the terms of the letter. They think that the intention of the Government was simply to annul the entry in the Nazul Register and restore the rights which existed when it was erroneously made. And they think that the effect of expunging the entry in the register was a disclaimer by the Government of all title, and a surrender or release of the property to those whom it might concern, or (in other words) those who would have been entitled but for the confiscation, according to

their several rights and interests, thus following out the policy of the Government at the general settlement of the land in Oudh. It would seem that some of the land had been parted with by ancestors of the appellants before the confiscation. Nor is there anything in the letter of the 26th of May 1879 which is inconsistent with this view of the effect of expunging the bazar from the register. Whatever the opinion of the Government might be on the materials before it, it would naturally not desire to prejudge any rights which might be asserted before the Law Courts, and the only direction in it is "to sanction the Deputy Commissioner's proposal to expunge the shops from the Nazul Register." This proposal, based on the report of which he gives a summary, is certainly not to give the ownership of the land to the occupiers. The earlier words in the letter which are relied on state the reasons for this order, which may have been based on an imperfect appreciation of the Deputy Commissioner's recommendation. But it must be remembered that the bazar was classed with the other lands belonging to the King of Oudh and so was entered as nazul. The minds of the Oudh Executive in 1879 would doubtless be addressed to the question whether the bazar did really belong to the King. As the report showed that zamindars and shopkeepers alike dealt with the land independently of the King, it was not far from accurate, though not well chosen, language to say that "the occupants appear, &c., &c.," with the meaning that the private claimants of interests enjoyed them undisturbed, in the same way as other people enjoy private property. What the Government does is to sanction the Deputy Commissioner's proposal, and reading the letter with the Tahsildar's report, and the Deputy Commissioner's recommendation, their Lordships cannot find in it any indication of the Government's intention to benefit either party at the expense of the other.

Their Lordships are also of opinion that the Appellants are not barred by limitation. There could not be any bar or title by limitation prior to the annexation. The act of State known as the confiscation, which followed soon afterwards, made a clean sweep of all titles and vested them in the Company from whom they passed to the Crown. There is no suggestion of a

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title by limitation against the Crown. As long as the Crown remained owner neither zamindars nor ryots had interests which they could enforce against one another. Nothing was done to divest the title of the Crown and to restore it to the former owners prior to the letter of the 26th of May 1879. To take that letter rather than the actual alteration of the registers as the act which conveyed title to the former owners from the Crown is the most favourable view for those who plead the bar of limitation. But this suit was commenced within 12 years of the date of the letter, and bar by time is therefore out of the question.

There was no actual finding by the Subordinate Judge on the first issue as to the title of the appellants. That Judge presumed for the purpose of argument that it might be answered in the plaintiff's favour, but, as already stated, it became immaterial. There should be a finding upon it now, and in this respect the decree of the District Judge requires amendment.

Their Lordships are of opinion that the Judicial Commissioner should have left the decree of the District Judge undisturbed except by directing that the matters contained in Issue I should be tried as well as the other matters of remand. Issue I, however, as at present framed will not enable the Court to finally adjudicate on the respective rights of plaintiff and defendant. It may be that the ryots have by long occupancy acquired some rights which will protect them against eviction at the will of the zamindar. Their Lordships therefore think it should be broken up into two issues as stated below.

In the result their Lordships think that the order of the Judicial Commissioner should be reversed and that the simplest course will be to discharge all the orders made in the Courts below and to direct that a decree be passed in the following form. On the second issue declare that the letter of the Government dated the 26th of May, 1879, coupled with the consequent removal of the bazar from the Nazul Register operated as a surrender and regrant by the Government of the bazar and the shops and houses in it to these persons, who, if they had not been confiscated, would now be entitled thereto according to their several rights and interests, and on the third issue find that the plaintiff was

not barred from bringing his suit by limitation. Substitute for Issue 1 the following issues:—

IA. Is the plaintiff (having regard to the foregoing declaration) proprietor of the land on which the bazar called Amaniganj in Sandila is situate?

IB. Have the residents of the bazar any and, if so, what rights and interests in the houses and shops therein occupied by them?

Remand the case to the Subordinate Judge for trial of the above issues, and also (if and so far as necessary) of Issues 4 and 5. Direct that the costs of the trial which has already taken place and of the appeals to the District Judge and Judicial Commissioner respectively abide the result of the suit. And they will humbly advise His Majesty accordingly.

Their Lordships observe that the Issue 4 does not accurately follow the words in which the custom is pleaded in paragraph 4 of the plaint, inasmuch as it speaks of "the value of the materials "of the tenant's house" whereas the plaint says "its" *(i.e.* the house's) "estimated price." But no doubt the variance was deliberately made and is the result of explanations given at the time of the settlement of the issues. Their Lordships content themselves with pointing out the variance and will not advise any alteration to be made in the language of the issue.

Their Lordships will direct that the costs of this appeal also do abide the result of the suit and be disposed of by the Courts below accordingly.

Appeal allowed; suit remanded.

Solicitors for the appellant:—Messrs. *Watkins and Lempriere.*

C. B.

GANGA BAKHSH SINGH (PLAINTIFF) *v.* DALIP SINGH AND OTHERS (DEFENDANTS).

P. C. 1901 *June* 20.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. XIV of 1891 *(Oudh Courts Act), section* 8*—Appeal—Jurisdiction —Appeal below heard by a Court not properly constituted Practice.*

The Oudh Courts Act (XIV of 1891), section 8, enacts that "an appeal from a decree or order of a Subordinate Judge to the Judicial Commissioner shall be heard by the Judicial Commissioner and the Additional Judicial Commissioner

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sitting together: provided (i) that the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and the amount or value of the matter in dispute or appeal to the Judicial Commissioner is the same sum or upwards; or (ii) that the decree or order appealed from involves directly or indirectly some claim or question to, or respecting property of, like amount or value." Where to an appeal before the Privy Council an objection was taken as a ground of appeal that a case coming within the above enactment had been heard on appeal by the Additional Judicial Commissioner sitting alone, the Judicial Committee allowed the appeal and remanded the case to be tried by a court properly constituted in accordance with the provisions of section 8 of Act No. XIV of 1891.

APPEAL from a judgment and decree (17th August, 1896) of the Additional Judicial Commissioner of Oudh, whereby a decree (30th June, 1894) of the Subordinate Judge of Rae Bareli dismissing the appellant's suit, was confirmed.

The plaintiff-appellant was the heir and successor of Sarabjit Singh, taluqdar of the Tikari estate. The defendants-respondents were the sons and grandsons of Sheopal Singh. Sheopal Singh, Binda Sewa, Raghunath Singh and Amir Singh were four brothers, sons of Jang Bahadur. Binda Sewa left a son, Sheoambar Singh. Raghunath Singh left a son, Sarabjit Singh. Amir Singh had no issue. After the confiscation of Oudh the second summary settlement of the taluq was made by the Government with Sarabjit Singh. Amir Singh, Sheopal Singh, and Sheoambar Singh sued him for their shares of the taluq, but their claims were dismissed by the Settlement Courts. They then preferred claims before the British Indian Association, or Committee of Taluqdars. These claims were eventually by agreement of parties disposed of by the Financial Commissioner, who, on the 9th of January, 1869, decided that Sheoambar Singh might be left to derive his maintenance from his own son's taluq, Shabwan. As to Amir Singh and Sheopal Singh, the Financial Commissioner decided that Amir Singh, being childless, should receive for his life a two-annas share in Tikari, and that Sheopal Singh should receive in perpetuity a three-annas share in that taluq; and that on the death of Amir Singh his share should be equally divided, one-anna reverting to Sarabjit Singh and the other going to Sheopal Singh and his heirs or successors.

Amir Singh died on the 23rd of September, 1869, before the decision of the Financial Commissioner had been given effect to,

and Sheopal Singh then applied to be put into possession of lands equivalent to the share allotted to him for maintenance as increased by Amir Singh's death to four annas. Accordingly certain villages "free from rent and liability to revenue" were made over to Sheopal Singh in lieu of Rs. 2,503-8-0 annual maintenance, which, "according to calculation, had been held to be equivalent to a four-anna share in the net profits of taluq Tikari."

Sheopal Singh died on the 11th of February, 1891; and on the 28th of January, 1892, the plaintiff instituted the suit out of which the present appeal arose, claiming in his plaint that from the date of Sheopal's death "the plaintiff acquired a right according to the principles embodied in the rules of maintenance laid down by the Committee of the British Indian Association to receive from the defendants one-fourth of the maintenance amount as an annual rent".

The rule referred to was one of those laid down for the guidance of the Committee, and approved of by the Financial and Chief Commissioners. It provided that where lands rent-free had been allotted as maintenance, in such a case as was the present one, the holders in the second generation should pay 25 per cent. of the profits as rent, and in the third generation 50 per cent.

The plaintiff therefore claimed Rs. 625-14-0 annual rent in respect of the villages held by the defendants.

Various questions were raised by the defence as to the capacity in which the Financial Commissioner gave his decision, as to the applicability of the rules of the British Indian Association and as to whether Sheopal Singh held the villages in perpetuity as proprietor and shareholder and not only for maintenance; but as the appeal to the Judicial Committee was decided on a preliminary ground, those questions are not material to this report.

The plaintiff valued his suit at Rs. 6,258 under section 7, cl. 2 of the Court Fees Act (VII of 1870) and instituted it in the Court of the Subordinate Judge with reference to sections 17 and 18 of Act XIII of 1879.

The suit was dismissed by the Subordinate Judge as not being maintainable; an appeal from that decision was heard by the Additional Judicial Commissioner sitting alone, and he affirmed

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the decree but not the decision of the Subordinate Judge. Section 8 of Act No. XIV of 1891 enacts that "an appeal from a decree or order of a Subordinate Judge to the Judicial Commissioner shall be heard by the Judicial Commissioner and the Additional Judicial Commissioner sitting together: provided (i) that the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and the amount or value of the matter in dispute on appeal to the Judicial Commissioner is the same sum or upwards; or (ii) that the decree or order appealed from involves directly or indirectly some claim or question to or respecting property of like amount or value."

From the decree of the Assistant Judicial Commissioner the plaintiff applied for a certificate of appeal to the Privy Council, and in support of his application he filed affidavits that his claim was worth 20 years' purchase of the annual rent. The first and second Judicial Commissioners who heard the application said "we have no doubt that the amount or value of the subject-matter of the suit in the Court of first instance and of the matter in dispute in appeal to Her Majesty in Council is Rs. 10,000 or upwards, and they granted a certificate that the case was a fit case in point of value for appeal to Her Majesty in Council.

The first and preliminary ground of appeal was—"Because under section 8 of Act No. XIV of 1891 the Additional Judicial Commissioner had no jurisdiction to hear the appeal, which should have been heard by him and the Judicial Commissioner sitting together."

Mr. *Leslie DeGruyther* contended on the above ground that the Additional Judicial Commissioner had no jurisdiction to hear the appeal alone. Section 8 of Act No. XIV of 1891 is express in its terms, and this case would come within cl. *(b)* proviso ii of that section; that is, the decree appealed from involved indirectly "a claim or question to or respecting property of Rs. 10,000 or upwards." The appeal should be allowed on this ground. In cases where a similar kind of objection has been taken by a respondent, it was held that the objection must prevail, unless withdrawn or waived—*Exparte Anderson* (1), where an objection was taken by the respondent that an appeal in bankruptcy had not been heard

(1) (1870) L. R., 5 Ch. Ap., 473.

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by the proper court, it rendered the appeal liable to be dismissed, but the objection was withdrawn. In *Hardeo Bax* v. *Jawahir Singh* (1), where a similar objection was taken, the dismissal of the appeal was avoided by the Judicial Committee granting special leave to appeal and the case proceeded. The objection here is taken as a ground of appeal by the appellant. Act No. XIII of 1879 (the Oudh Civil Courts Act, 1879), sections 17 and 18, as amended by Act No. XX of 1890 (the N.-W. P. and Oudh Act, 1890) sections 39 and 40, was referred to.

Mr. *J. D. Mayne* for the respondents, admitted that the case appeared to be wrongly before the Judicial Committee, the respondents had themselves taken this very point at a former stage of the case.

1901, June 20th.—The judgment of their Lordships was delivered by LORD HOBHOUSE :—

In this case their Lordships will humbly advise His Majesty to discharge the decree of the Additional Judical Commissioner of Oudh of the 17th of August, 1896, to allow the appeal, and to remand the case to the Court of the Judicial Commissioner of Oudh, to be tried by the Judicial Commissioner and the Additional Judicial Commissioner sitting together, as provided by law.

Their Lordships give no costs of the present proceedings.

Appeal allowed; case remanded.

Solicitors for the appellant :—Messrs. *Watkins and Lempriere.*

Solicitors for the respondents :—Messrs. *T. L. Wilson and Co.*

J. V. W.

BATUL BEGAM (PLAINTIFF) *v.* MANSUR ALI KHAN AND OTHERS (DEFENDANTS).

P. C. 1901 *June* 19. *July* 13.

[Appeal from the High Court, North-Western Provinces, Allahabad.]

Act No. XV of 1877 *(Indian Limitation Act), schedule ii., articles* 10, 120, 144—*Suit for pre-emption against heir of mortgagee by conditional sale—"Physical possession," meaning of—Accrual of cause of action in suit for pre-emption of property mortgaged by conditional sale—Expiration of year of grace.*

A suit brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed, where the

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(1) (1877) L. R., 4 I. A. 178 ; I. L. R., 3 Calc., 522.

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subject of the sale does not admit of physical possession and there is no registered instrument of sale, not by article 10 but by article 120 of schedule II of the Indian Limitation Act (No. XV of 1877), and limitation in such a suit runs from the expiration of the year of grace, that being the period when the right of the mortgagee has become mature: the mere fact that he has not enforced that right by a suit for possession is immaterial. *Ali Abbas* v. *Thakur Prasad* (1) followed.

Where the property sold was an undivided share in certain villages, *Held*, that the "subject of the sale" did not admit of "physical possession" within the meaning of article 10 of the Indian Limitation Act. The expression used by Stuart, C. J., in *Jageshar Singh* v. *Jawahir Singh* (2), in regard to the words "actual possession," is applicable with still more certainty to the words "physical possession," by which is meant a "personal and immediate" possession. In the present case such possession could not have been taken by the mortgagee without enforcing partition: article 10 therefore did not apply.

Nor was article 144 applicable. Claims to pre-emption are specially considered in article 10, and although the particular claim in the present case did not (for the reasons above stated) fall within it, that did not affect the construction of article 144 as illustrated by article 10. A claim to enforce a right of pre-emption is, as the latter article shows, a claim impeaching another's right, and its primary object is to set aside the competing right. The circumstance that the plaint in the present suit inverted the proper order and, instead of first asking for the setting aside and then asking possession as the consequence, had asked for possession "by setting aside" could not alter the nature of the action.

APPEAL from a judgment and decree (16th February, 1898) of the High Court at Allahabad (3) confirming a decree (28th November, 1894) of the Subordinate Judge of Gorakhpur, by which a suit brought by the present appellant was dismissed as being barred by lapse of time.

The suit was brought to enforce a right of pre-emption in respect of certain shares in four villages named Patringwa, Sandhuria, Pipra, and Parsa. Of the three first-named villages the defendant Mansur Ali Khan and one Zahur Ali Khan, who were brothers, owned two-thirds in equal shares, and they owned the whole of the fourth village also in equal shares.

On the 14th of March, 1868, Zahur Ali Khan made a mortgage by conditional sale of his shares in the four villages in favour of one Sarju Prasad, represented in this appeal by the respondent Bhagwati Prasad. The possession of the mortgaged properties,

(1) (1892) I. L. R., 14 All., 405. (2) (1876) I. L. R., 1 All., 311.
(3) I. L. R., 20 All., 315.

however, remained with the mortgagor. This mortgage was foreclosed, and the period of grace of one year given by Regulation XVII of 1806 expired on the 20th of January,,1881.

Zahur Ali Khan died in 1876, and after his death his brother Mansur Ali Khan brought a suit in 1881 for redemption of the mortgaged property. That suit and the appeal to Her Majesty in Council made therein from a decree of the High Court were eventually dismissed by an order of Her Majesty in Council dated the 13th of July, 1886, on the ground that the mortgagor had not done what was necessary by the terms of Regulation XVII of 1806 to entitle him to redemption (1). Afterwards Bhagwati Prasad, the son of Sarju Prasad, the original mortgagee, brought a suit for possession of the mortgaged property and for mesne profits. That suit was decreed on the 4th of August, 1891, by the then Subordinate Judge of Gorakhpur, and on the 6th of July, 1893, the High Court on appeal confirmed his decree. Bhagwati Prasad was thereupon put into formal possession of the shares in the four villages, and on the 27th of November, 1893, executed a dakhalnama (receipt of possession) in the usual manner.

On these proceedings coming to her notice, the plaintiff, Batul Begam, the wife of the defendant Mansur Ali Khan, on the 4th of July, 1894, filed the suit out of which the present appeal arose, praying *(inter alia)* for possession of the mortgaged shares in the four villages on the basis of pre-emption, the condition of the wajib-ul-arz, the custom of the village, and the right of pre-emption under Muhammadan Law, by setting aside all the proceedings and the foreclosure decree on payment of Rs. 35,000, the consideration money, or of any other sum which the Court might determine. The plaintiff based her right to sue on a gift made to her by her husband of a six-pie share of his original interest in the four villages, and she described herself as "a near co-sharer" of the vendor in the conditional sale and so entitled to pre-emption. The only defendant who filed a written statement was Bhagwati Prasad, and the only defence material, so far as the present appeal is concerned was that the suit was barred by limitation.

(1) See *Mansur Khan* v. *Sarju Prasad*, L. R., 13 I. A., 113; I. L. R., 9 All., 20.

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On the 28th of November, 1894, the Subordinate Judge of Gorakhpur dismissed the suit as being barred by limitation. He referred to the case of *Ali Abbas* v. *Kalka Prasad* (1), in which it was held that where a mortgage by conditional sale has been duly foreclosed in accordance with the procedure laid down in Regulation XVII of 1806, and at the expiration of the year of grace the mortgage money, or a portion thereof, remains unpaid, the title of the conditional vendee becomes absolute on the expiration of the year of grace, and the six years' period of limitation prescribed by article 120 of schedule II of the Limitation Act for a suit for pre-emption of the mortgaged property begins to run against the pre-emptor from the expiration of the year of grace, and held that there was no reason for not applying the law so laid down to the present case.

The plaintiff appealed to the High Court, and on the 12th of November, 1896, a Division Bench of that Court (BANERJI and AIKMAN, JJ.) at the first hearing of the appeal made an order referring to the Court below the following issue:—"Does the property in suit admit of physical possession?" On that issue the Subordinate Judge held on the oral and documentary evidence adduced with reference to it, and having regard to the cases of *Unkar Das* v. *Narain* (2) and *Bholi* v. *Imam Ali* (3) that the property in suit did not admit of physical possession. Objections to this finding were filed by the plaintiff in the High Court, and the appeal was referred by the Division Bench to a Full Bench of the Court for disposal.

On the 16th of February 1898 the Full Bench (EDGE, C.J. and BLAIR, BANERJI, BURKITT, and AIKMAN, JJ.) dismissed the suit, holding that it was barred by article 120, schedule II of the Limitation Act. The case before the High Court is reported in I. L. R., 20 All., 315.

The plaintiff appealed to His Majesty in Council.

Mr. *G. E. A. Ross* for the appellant contended that the Courts below were wrong in holding that the suit was barred by lapse of time. The article applicable to suits for pre-emption is article 10 of schedule II of the Indian Limitation Act, and under that article limitation runs from the date of the purchaser's getting "physical

(1) (1892) I. L. R., 14 All., 405. (2) (1881) I. L. R., 4 All., 24.
(3) (1881) I. L. R., 4 All., 179.

possession," or in a case where physical possession is not practicable then from the date of registration of the instrument of sale." Here there is no instrument of sale registered. The question then is whether "physical possession" is practicable in this case, and that depends on the meaning given to those words. It is submitted that they mean the same as "actual possession," and according to a ruling of the majority of a Full Bench of the Allahabad High Court in *Jageshar Singh* v. *Jawahir Singh* (1) "actual possession" was the same thing as the "possession" of Act XIV of 1859, the earlier Limitation Act, and included constructive possession. If so, the property the subject of sale in this case admitted of "physical possession," and the High Court in the judgment now under appeal says that if the property allows of physical possession being taken, article 10 of the Limitation Act applies. Stuart, C.J., in the above case differed from the majority of the Full Bench and was of opinion that "actual possession" meant visible and tangible possession; but even if that interpretation be put on the words, limitation would not commence until such possession were taken, assuming that article 10 is applicable. No such possession has been taken or had by the vendee. As to the meaning of physical possession the case of *Unkar Das* v. *Narain* (2) and Starling on Limitation commenting on article 10 of schedule II, were referred to.

If article 10 does not apply, article 144 should govern the case, and not article 120. Article 120 is not to be applied unless in a case where no other article is applicable. Article 144 applies to suits for possession of immovable property; and this is a suit for possession. The prayer of the plaint is for possession by setting aside the foreclosure proceedings.

Even if the case is held to be governed by article 120, it is submitted that the cause of action does not accrue from the expiration of the year of grace as held by the High Court, but from the time the final decree for possession was passed in favour of the mortgagee; that would be in November 1893, so that, the period of limitation being six years, the suit would not be barred. As to the accrual of the cause of action and the time from which

(1) (1876) I. L. R., 1 All., 311. (2) (1881) I. L. R., 4 All., 24.

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limitation began to run, *Forbes* v. *Ameeroonissa* (1) and *Ali Abbas* v. *Thakur Prasad* (2), were referred to.

The respondent did not appear.

The judgment of their Lordships was delivered by LORD ROBERTSON.

The sole question in this appeal is whether the suit, brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is time-barred, six years having elapsed from the expiry of the year of grace after foreclosure; and the main controversy comes to be whether the 120th article of the second schedule to the Limitation Act of 1877 applies to the case. Admittedly it does apply, unless either article 10 or article 144 applies; and the real question is whether the appellant is right in affirming that the case falls under article 10. There is, however, a subordinate question as to the period from which the six years run, assuming article 120 to apply.

The appellant is the wife of the nominal respondent, Mansur Ali Khan, and she derives from him by gift a six-pie share of his original interest in the villages now in dispute, the remainder of his interest being still vested in him. This Mansur Ali Khan and his brother, Zahur Ali Khan, at the date of the mortgage owned two-thirds of each of the villages of Pathringwa, Senduria, and Pipra Kalan, each brother holding shares of 5 annas 4 pies; and the two owned the whole of the village of Parsa, each brother holding an eight-anna share. The brothers were Muhammadans. Two of the villages were of pure zamindari tenure, the others were imperfect pattidari.

On the 14th of March, 1868, Zahur Ali Khan, in consideration of money lent, executed a deed of conditional sale to Sarju Prasad, now deceased (whose heir is the respondent Bhagwati Prasad), of the whole of his shares in the four villages. It is unnecessary to set out this sale deed, as nothing turns on its particular terms. No change of possession took place on the execution of the mortgage. Zahur Ali Khan died in January 1876. In 1880 the mortgagee having also died, the respondent, Bhagwati Prasad, his heir, foreclosed (by proceedings taken under Regulation XVII of 1806), and the money was not paid within the year of grace,

(1) (1865) 10 Moo., I. A. 340 (349). (2) (1892) I. L. R., 14 All., 405.

which expired on the 20th of January, 1881. Some litigation ensued which is immaterial to the present question and the rehearsal of which would only obscure the narrative. In 1890, Bhagwati sued in the Court of the Subordinate Judge of Gorakhpur that he might "be put in proprietary possession of a 5 anna 4 pie share in each of Senduria, Pathringwa, and Pipra Kalan and an eight-anna share of mauza Parsa by ejecting and dispossessing the defendants or any of them who may be found in possession thereof and by declaring their right of ownership to be extinct," and he obtained a decree which on appeal was affirmed by the High Court on the 6th of July, 1893. The terms of the decree were *inter alia*:—"It is decreed and ordered that the claim of the plaintiff for possession of the shares of the villages mentioned in the relief be decreed." On the 27th of November, 1893, Bhagwati executed a dakhalnama, declaring that under the order of the Judge "Munshi Jamiat Rai, the Amin of the Court, has given formal possession to me, the decreeholder, through my karinda (agent) over the shares of the villages detailed below," and the names of the villages and number of the shares are duly set out. Mutation of names was also obtained in respect to the shares. Bhagwati then attempted to take physical possession of the estate, but he was successfully resisted by Mansur Ali Khan. Bhagwati therefore never had possession at all, unless the possession of Mansur Ali Khan or the possession of the tenants, or his own "formal possession" will suffice; and it has not been suggested that his legal rights entitled him to anything more, in the way of possession, than he actually obtained, unless and until he had enforced a partition, which in fact never took place.

On the 4th of July, 1894, the appellant filed her plaint. She narrated the conditional sale, the foreclosure, the decree of possession, and the "delivery of possession." She described herself as a near co-sharer of the vendor (in the conditional sale), and asserted that under the condition of the wajib-ul-arz the usage and right of pre-emption under the Muhammadan law she possesses a preferential right of purchase. Her prayer, so far as material, was that a decree awarding possession over the mortgaged shares of the villages might be passed in her favour on the basis

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of pre-emption, the condition of the wajib-ul-arz, the custom of the village, and the right of pre-emption under the Muhammadan law, by setting aside all the proceedings and the foreclosure decree, on payment of Rs. 35,000, the consideration money, or of any other sum which might be determined by the Court. A written statement was filed by the respondent, Bhagwati, in which various grounds of defence were stated :—*inter alia*, limitation was pleaded, the validity of the gift to the appellant which constitutes her title to claim pre-emption was challenged, and her alleged right of pre-emption was denied. Issues were settled on the 19th of September, 1894, but of those the only one which has been tried and decided, and requires present notice, is that of limitation. For the purposes of the present question, therefore, the appellant is to be assumed to have had a right of pre-emption, and the question is whether she had lost it by limitation before her plaint was filed.

On the 28th of November, 1894, the Subordinate Judge dismissed the suit on the ground of limitation, with costs. He held that the title of the conditional vendee became absolute on the expiration of the year of grace, and that the six years' period of limitation prescribed by article 120, schedule II of the Limitation Act begins to run against the pre-emptor from the expiration of the year of grace.

The appellant appealed to the High Court, who on the 12th of November, 1896, remanded the case for the trial of the following issue :—"Does the property in suit admit of physical possession?" Evidence was taken, and the Subordinate Judge on the 11th of January, 1897, held that the property in suit does not admit of physical possession. On appeal the High Court, on the 16th of February, 1898, dismissed the appeal with costs; and it is against that judgment that the present appeal has been taken.

The view of both Courts is that the appellant's claim falls under the 120th article of the second schedule of the Limitation Act, 1877, which is the final and residuary article including all suits not specially provided for, and fixing for all such suits the limitation of six years. It is for the appellant to show which other article fits her claim; she points first to the 10th article :—to this article most of the discussion has been directed, and this

occasioned the remand. The 10th article purports to apply to suits "to enforce a claim of pre-emption whether the right is founded on law or general usage or on special contract." One year is the period of limitation; and the time from which this period begins is "when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale has been registered." The interest of the appellant to maintain the application of the 10th article is that, if the subject is susceptible of possession, then possession has yet to be taken, for none has as yet been had.

The "property sold," "the subject of the sale," was in this case the 5 anna 4 pie share of each of the three villages and the eight-anna share of the fourth. Various questions of more or less subtlety suggest themselves as to the relation of the holder of such a right to the possession of the estate. All those questions are, however, superseded by the extreme absoluteness of the language of the tenth article of the Limitation Act. What has to be considered is, as the High Court accurately formulated, the question, Does the property admit of physical possession? The word "physical" is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used,—first in 1859 prescribing "possession," then in 1871 requiring "actual possession," and finally in 1877 substituting the word "physical" for "actual," it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Court are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C.J., in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession.

This being the sound construction of the tenth article of the second schedule to the Act of 1877, the facts completely fail the appellant, for the mortgagee's heir had no semblance of physical

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possession in the true and natural sense of the term. All that he had directly was the "formal possession" constituted by the dakhalnama, which was ceremonial and on paper. The physical possession of the villages was with others, and Bhagwati, not having enforced a partition, could not get physical possession of any definite portion of those lands and had no right to oust the existing occupiers. Accordingly their Lordships consider that the case does not come within the tenth article, in so far as possession is concerned. This being so, the alternative stated in the third column relating to registration arises, but the appellant did not argue upon it and no suggestion has been made that it affects the argument. The tenth article accordingly disappears from the case.

The alternative suggestion that article 144 applies cannot be supported. It applies to suits "for possession of immovable property or any interest therein not hereby otherwise specially provided for," and the 12 years of limitation are to begin "when the possession of the defendant becomes adverse to the plaintiff." Now it is perfectly clear that claims of pre-emption are specially considered in article 10, and although this particular claim of pre-emption does not (for the reasons already stated) fall within it, that does not affect the construction of article 144, as illustrated by article 10. A claim to enforce a right of pre-emption is, as article 10 shows, a claim impeaching another's right; and its primary object is to set aside the competing right. The circumstance that this plaint has inverted the proper order and, instead of first asking the setting aside and then asking possession as the consequence, has asked for possession "by setting aside" cannot alter the nature of the action.

If neither article 10 nor article 144 applies, then admittedly the 120th article does; and the only remaining question is at what date does the period of six years begin? or, to apply the words of the Act, when did the right to sue accrue to the appellant? It seems to their Lordships to be clear that the expiry of the year of grace is the time at which the pre-emptor's right arises. The mortgagee's right of property had then become mature, and the mere fact that he had not enforced that right by a suit of possession does not affect the question. Their

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Lordships are satisfied of the soundness of the decision of the High Court of the North-West Provinces in *Ali Abbas* v. *Thakur Prasad* (1).

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Barrow, Rogers and Nevill.* J. V. W.

P. C. 1901. *June* 21 *July* 2, 3, 4, 5, *and* 27.

ASGHAR ALI KHAN (PLAINTIFF) *v.* KHURSHED ALI KHAN AND ANOTHER (DEFENDANTS) AND TWO OTHER APPEALS.

[On appeal from the High Court of Judicature for the North-Western Provinces, Allahabad.]

Act No. XV of 1877 *(Indian Limitation Act), schedule II, article* 89—*Suit for account between principal and agent—Termination of agency—"Movable property"—Money—Evidence as to account stated.*

The appellant and respondent, two brothers, were agents the one for the other in dealing with their joint estate, and the agency was found on the evidence to have continued until the 22nd of December, 1885, when the appellant brought a suit against the respondent for his share of money received by the respondent on the joint account. *Held* by the Judicial Committee (upholding the judgment of the High Court) that a cross suit brought by the respondent against the appellant for an account was governed by article 89 of schedule II of the Limitation Act, and, having been brought within three years of the termination of the agency, it was not barred.

"Movable property" in article 89 includes money.

The appellant put forward a *rukka* and list evidencing a settlement of accounts supported by a substantial body of evidence of persons apparently of good repute, but which the respondent alleged to be fabricated. *Held* that the High Court rightly rejected the positive evidence in favour of the settlement when it appeared that the facts ascertained on other evidence in the case as to certain items in the list were conclusive to the contrary of what was there set out, and inconsistent with the existence of the alleged settlement.

CONSOLIDATED appeal against three decrees (9th March, 1897) of the High Court at Allahabad, whereby decrees (15th and 16th September, 1893) of the Subordinate Judge of Saharanpur in two suits brought against each other by the appellant and first respondent, respectively, were reversed.

Present:—LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

(1) (1892) I. L. R., 14 All., 405.

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The appellant and first respondent were brothers. The second respondent Muzaffar was the son of the first respondent. The first suit (189 of 1885) was brought by the appellant against Khurshed and Muzaffar for a moiety of Rs. 74,800, a sum received by Khurshed as the share due to the two brothers from their uncle Husain Ali, on a partition of the family property. In that suit the Subordinate Judge decreed the claim as against Khurshed, but dismissed it as against Muzaffar. Khurshed appealed from this decree so far as it made him liable; and Asghar also appealed from it so far as it dismissed his suit against Muzaffar. The result of the two appeals was that Asghar's suit was wholly dismissed.

The second suit (211 of 1888) was brought by Khurshed against Asghar for money due on a balance of accounts. The Subordinate Judge dismissed the suit, but on appeal by Khurshed, the High Court reversed that decree and gave Khurshed a decree for a sum of about Rs. 25,000.

Asghar's suit was brought on the 22nd of December, 1885. The plaint stated that the property of Asghar, Khurshed, and a third brother Ahmad, had been under the management of Husain Ali; that on a settlement of accounts in 1875, when their properties were given over to them, a sum of Rs. 74,800 was found due to them, which was paid by Husain Ali on the 8th of June, 1875, and received by Khurshed under a power-of-attorney from Asghar; that of this sum Khurshed deposited in the joint names of both brothers Rs. 10,000 with Gulab Singh, Rs. 4,800 with the firm of Bansidhar, and the balance Rs. 60,000 he deposited in his own name in the Bank of Upper India at Meerut. This sum, the plaint alleged, Khurshed had withdrawn from the Bank, invested about half of it in a mortgage from one Shere Singh in the name of Muzaffar, and placed the rest of the money in the Bank to the account of Muzaffar. The plaint claimed the original moiety with interest, in all Rs. 57,509 (for which it was alleged a claim had been made on the 25th of November 1885), and also prayed for a declaration that the money deposited in the names of Khurshed and Muzaffar was liable for any decree that might be passed; and for a similar declaration as to the sum advanced on mortgage to Shere Singh in Muzaffar's name.

On the 9th of March 1886 Khurshed filed his written statement, in which he relied on limitation as barring the suit and alleged that he and Asghar were partners, and until the partnership account was adjusted no claim for a specified item could be made; that since the receipt by him of the sum in dispute Asghar had received sums amounting to Rs. 1,08,040, besides other sums of which he had given no account, and that altogether Asghar was largely in his debt. He filed a list of items showing this indebtedness. The sum of Rs. 14,800 he alleged had been long since recovered by both parties, and as to the sum in the Bank he asserted that it was his own money, and was not received by him as agent, and that he had given it to his son, Muzaffar.

Muzaffar also filed a written statement on the same date, in which he made the same allegations as to the money in deposit and on mortgage, and submitted that the suit was bad for misjoinder.

With his written statement Khurshed filed, amongst other documents which he had produced in obedience to an order of the Court on the 23rd of February, 1886, a letter signed by himself, dated the 9th of November, 1885, from himself to Asghar, in which he said: "I wish that all accounts up to this time should be cleared, settled, and disposed of, so that the matter might be cleared up." Endorsed on the letter was a reply from Asghar: "Please settle the account. I am responsible for what may be found due by me."

On the 31st of March Asghar filed a written statement in reply, being called on by the Court to do so. In it he denied the allegations as to the sum of Rs 1,08,040 and the other sums alleged to have been received by him, and submitted that they could not be set off under section 111 of the Civil Procedure Code. He denied having received anything from Khurshed in respect of the Rs. 14,800. He also pleaded a settlement of account with Khurshed except as to the Rs. 74,800, and he filed as evidencing such settlement of account a *rukka* or note-of-hand executed as a memorandum by himself in favour of Asghar and dated the 13th of March, 1885, and an extract from the list of items signed by himself and Asghar on that date. These documents are set out in their Lordships' judgment, as also are the issues in the suit.

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The settlement of accounts of the 13th of March, 1885, was alleged by Khurshed to be a fabrication. It was spoken to by Asghar himself and by a number of respectable and apparently credible witnesses who were present on the occasion; there was evidence also of Khurshed's hand-writing by several witnesses, who had become acquainted with it in the course of business and against whose credibility no suggestion was made. Khurshed rested his defence to this settlement of accounts on an *alibi* showing he was not at Jansath where the settlement is said to have taken place, but at Muzaffarnagar, at the time of the transaction. He also relied on the settlement alleged by himself of the 9th of November, 1885, which was not admitted by Asghar.

The first decision in the suit was given by the Subordinate Judge on the 15th of September, 1890. In it he dealt only with the questions of misjoinder and limitation. The former objection he held was taken too late for it to be given effect to: on the latter ground he dismissed the suit as barred; the High Court, however, on appeal on the 16th of January 1893 reversed this decision, and remanded the case for trial on the merits.

On the 15th of September 1893 the Subordinate Judge again gave a decision in the suit, decreeing the suit against Khurshed for the entire sum claimed with interest and costs, but dismissing it as against Muzaffar.

Both Khurshed and Asghar appealed from this decision, and on the 24th of April, 1896, the High Court (BANERJI and AIKMAN, JJ.) held that the alleged settlement of accounts of the 13th of March, 1885, never took place, and that the documents supporting it were not genuine; that the objection to the suit as being one for a specific item in a series of transactions was untenable, and that Khurshed had in equity a right to claim a set-off. The material portion of their judgment as to these points was as follows:—

"There is evidence produced by Khurshed which renders it highly improbable that Khurshed was at Jansath on the date upon which the *rukka* of the 13th of March, 1885, is alleged by the plaintiff and his witnesses to have been executed there. The learned counsel for the appellant endeavoured to support his case by comparing the signatures on the *rukka* and list with genuine signatures of his client. An argument drawn from a comparison of signatures is seldom

conclusive, but it must be admitted that the signatures on the *rukka* and list resemble one another more closely than any other pair of genuine signatures produced, and that they bear a greater similarity to the signatures of 1876 than to any of the signatures after 1880. A number of witnesses have been produced by the plaintiff whose statements, if they are to be believed, prove that in March, 1885, there was an adjustment of accounts between the brothers, in consequence of which the *rukka* and list were prepared and signed by Khurshed, but the considerations which we have set forth shut us up to the conclusion that these witnesses are unworthy of credit. We have the unexplained absence of all mention in the plaint of so material a circumstance in support of the case brought into Court as the *rukka* of the 13th of March, which could not possibly have escaped the plaintiff's recollection. We have to our minds the irresistible internal evidence of the items of the list to which we have referred above which satisfies us that it is fictitious. We have the letter of the 9th of November, 1885, from Khurshed Ali to his brother with Asghar Ali's endorsement hereon, both of which are, in our opinion, genuine, and which are utterly inconsistent with the genuineness of the *rukka* and the list. We think that it is in every way more probable that the *rukka* and list were fabricated by or on behalf of the plaintiff to meet the letter of the 9th of November, 1885, than that the latter letter was fabricated by Khurshed Ali to meet a case which had not even been hinted at when the letter of the 9th of November was put in. We therefore repel the plaintiff's plea that an adjustment had taken place.

"We have now to consider the other contentions raised on behalf of the appellant. Those contentions are two-fold—first, that having regard to the nature of the dealings between the parties the plaintiff was not entitled to maintain a suit for a specific item, but could sue only for an account, and that on this ground the plaintiff's suit as brought should have been dismissed. Secondly, conceding that such a suit was maintainable, the defendant could protect himself against the plaintiff's demand by showing that the other items equal to or exceeding the amount claimed by the plaintiff were due to the defendant and that he could claim a set-off of such items.

"As regards the first contention we cannot go the length of holding that the suit as brought was absolutely untenable. The relation between the parties was of a peculiar and composite nature. They cannot be described as partners. They were joint owners of certain property which was managed sometimes by one and sometimes by the other on behalf of both. They stood to each other in the relation of principal and agent, with this qualification that one of them had authority from the other to appropriate for individual purposes the common fund of both with the liability to account for the amounts so appropriated. There can be no doubt that a principal can sue his agent for a specific item out of the amounts received by the agent, although in doing so the principal might incur the risk of a claim for other items due to him by the agent being disallowed subsequently. In this view the plaintiff was entitled to sue for the item claimed by him which had been admittedly received by the defendant for both of them. We cannot therefore sustain the first of the

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contentions referred to above. We are of opinion that the second contention is valid, and we hold that looking to the peculiar relationship between the parties it would be inequitable to allow the plaintiff to recover a specific item without allowing the defendant the opportunity of setting off any sums which he may be able to prove that he has disbursed on plaintiff's account. This in fact is one of that numerous class of cases in which the transactions between the parties are such as to make it inequitable that the plaintiff should recover and that the defendant should be driven to a cross suit. If we were to hold that the defendant's only remedy was by way of a cross suit, injustice would result, as many of the items due to the defendant might be time-barred. The defendant did not advance a claim for what he alleges to be due to him, trusting to the other debts as the means of discharging the items so due. For those items the defendant has been led by the understanding which existed between him and the plaintiff to give credit, that understanding being that an adjustment of account should take place between the two. It has been repeatedly held that an equitable right of set-off exists independently of the provisions of section 111 of the Code of Civil Procedure. In our opinion this is a case in which the defendant had in equity a right to claim a set-off, and such a set-off we hold the defendant to have claimed in his written statement. The Court below was therefore not justified in refusing to go into the question of account and in making a decree for the amount claimed by the plaintiff, simply on the ground that it was his share out of a joint fund belonging to the parties."

In the result the suit was referred to the Lower Court "for the purpose of finding which, if any, of the items in the list appended to Khurshed's written statement are due to him by Asghar Ali." The Subordinate Judge found some of these items in favour of Khurshed, and others in favour of Asghar; and the case came again to the High Court, in which the same Judges gave their final judgment on the 9th of March, 1897, by which they allowed the appeal and dismissed Asghar's suit as against Khurshed. In doing so they observed :—

"Discarding then the items which we concur with the Subordinate Judge in thinking should be disallowed to the defendant, and also those which the defendant has abandoned, the total of the remaining items amounts to Rs. 70,655-6-2½. The total amount claimed by the plaintiff and decreed to him by the Court below is Rs. 57,509-11-0. This amount is one-half of two sums of Rs. 60,000 deposited with the Bank of Upper India, and Rs. 14,800 deposited with native bankers, including interest thereon. As to this sum of Rs 14,800 deposited with native bankers at Meerut, we have already found in our order of the 24th of April 1896, that an examination of the accounts proves that that sum was drawn out and spent for joint purposes, so that the claim for that sum is untenable. As for the amount deposited in the Bank of Upper India, the plaintiff's share including the interest which the Bank paid on the amount of the deposit, amounted to Rs. 45,457-11-0 As this sum is much less than the amount which we have found to be due to the defendant from the plaintiff, and

as having regard to the relations between the parties the defendant was entitled to set off that sum against the amount due to the plaintiff, the Court below ought, in our opinion, to have dismissed the plaintiff's suit.

"The result is that we allow this appeal and setting aside the decree below dismiss the plaintiff's suit with costs here and in the Court below."

Asghar's appeal from the decision of the Subordinate Judge, dismissing his suit against Muzaffar, was dismissed on the same date.

Whilst the two suits out of which the present appeal arose were proceeding, Khurshed Ali on the 18th of November brought a suit against Asghar to recover the half share of Rs. 6,000 alleged to have been received by Asghar on joint account from their uncle, Husain Ali. The first Court dismissed it as barred by limitation, and this decision was affirmed by the District Judge, whilst the High Court dimissed it on the 9th of March, 1897, as relating to an item which is included in Khurshed's suit No. 211 of 1888. No appeal was brought from this decision.

The second suit (211 of 1888) was brought by Khurshed against Asghar Ali on the 9th of November, 1888. In his plaint he alleged that he and his brother had been carrying on a joint business, the management of which was entirely in the defendant's (Asghar's) hands; that during the partnership joint and personal items of Khurshed were used in the joint business or by Asghar in his personal transactions, which sums it was agreed should be received or paid at the time of adjustment of account; that the only joint sum received by Khurshed was Rs. 74,800, out of which Rs. 14,800 had been credited in joint account and subsequently spent in the joint business, leaving only Rs. 30,000 payable to Asghar as against Rs. 1,04,030 due by him to Khurshed as set out in a list annexed to the plaint; and that Asghar had never rendered any account, though he had promised to do so on the 9th of November, 1885. Khurshed stated that his cause of action arose on the 23rd of December, 1885, when Asghar's suit (189 of 1885) against him was instituted, and he prayed for an account and for the payment of Rs. 74,030 or whatever balance might be found due to him from Asghar.

Asghar put in a written statement in which he denied that any partnership or joint business existed between himself and Khurshed, except that they were co-sharers in an hereditary

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zamindari which was divided in 1882, and that there were certain small personal items due to him and realized by the other which were finally settled on the 13th of March 1885. Since that time he alleged that all the accounts had remained in possession of Khurshed. He relied on limitation as barring the suit.

On the 15th of September, 1890, the Subordinate Judge dismissed the suit, considering that the dismissal of suit No. 189 of 1885, which took place on the same day, left the plaintiff in suit No. 211 of 1888 without a cause of action.

The High Court on the 16th of January, 1893, reversed this decision and remanded the suit (together with suit No. 189 of 1885), for a decision on the merits.

The Subordinate Judge dismissed the suit as barred by article 61 of schedule II of the Limitation Act, and not being within article 106.

On appeal by Khurshed, the High Court (BANERJI and AIKMAN, JJ.) on the 9th of March 1897 held that the limitation applicable to the suit was not article 61, but article 89, and that Asghar's agency did not terminate till he filed suit No. 189 of 1885 on the 22nd of December 1885, but that in any case the endorsement by him on Khurshed's letter of the 9th of November 1885 saved the suit from being barred. They reversed the decision of the Subordinate Judge and gave Khurshed a decree for Rs. 25,075 with interest.

Against the three decisions of the High Court Asghar appealed to the Privy Council, and the three appeals were consolidated by order of the Judicial Committee on the 12th of December, 1900.

Mr. *J. D. Mayne* for the appellant contended that the High Court were wrong in rejecting the settlement of accounts of the 13th of March 1885. They gave no weight to the positive evidence in its favour which was given by a number of respectable and credible witnesses, several of whom were the friends and relations of both parties, and although the High Court admit that the evidence as to Khurshed's handwriting and the fact that the signatures on the *rukka* and list resemble one another more closely than any other pair of genuine signatures produced are in favour of the genuineness of the documents, yet they decide against them in a very cursory and unsatisfactory manner, founding such

opinion on presumptions drawn from an examination of some of the items in the list, and on the ground of the great improbability that Khurshed could ever have signed such documents. The High Court have erred, too, in accepting the evidence as proving Khurshed's *alibi;* whereas it is far from being conclusive; and also in allowing a set-off by Khurshed which was not legally admissible. Khurshed's suit should have been held to be barred by limitation; article 61 or 62 of schedule ii of Limitation Act, giving a three years' period of time is applicable to the suit. The cause of action arose when the agency terminated, which was in May 1884, when the relations between the parties were inconsistent with its continuance. Article 89 does not apply, the suit is not one for "movable property." Articles 48, 49, and 133 were also referred to. The letter of November 9th, 1885, has not been proved to be genuine; it is not admitted by Asghar and is not a sufficient acknowledgment to prevent the suit from being barred. Even if it were, the suit was not brought until the 9th of November 1888, which is a day too late.

Mr. *Herbert Cowell* and Mr. *Walter Colvin* for the respondents contended that the *rukka* and list of the 13th of March 1885 were rightly held to be fabricated notwithstanding the evidence in their favour, and the High Court were right in saying on an examination of the items they refer to that it was impossible Khurshed would ever have signed the documents evidencing the alleged settlement. One of these items shows that by doing so he would have been admitting a debt which he had already paid, and other items also show how incredible it was that he could have signed the documents. It is in all probability correct, as suggested by the High Court, that the settlement was only put forward to answer the case made by Khurshed, founded on the letter of the 9th of November, 1885. If genuine, the settlement would have been put forward from the first. The set-off was quite rightly allowed. As to limitation, article 89 of schedule ii of the Limitation Act is applicable to Khurshed's suit: there was the relation of principal and agent between the parties, and the agency did not terminate until Asghar brought his suit on the 22nd of December 1885. Even if it came to an end in 1884, there is Asghar's admission in the letter of the 9th of November 1885,

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which is shown to be genuine and saved the suit from being barred. By the exclusion of a day as allowed by section 12 of the Limitation Act, the 9th of November 1888 was the last day on which the suit could be instituted, so that it is just within time.

Mr. *Mayne* was heard in reply.

1901.—July 27th.—The judgment of their Lordships was delivered by LORD ROBERTSON—

This litigation between the appellant and the respondents has lasted for fifteen years; it has increased in volume and complexity as it proceeded in the devious courses recorded in the printed book; and yet the essential facts are not of unusual complication. It would be unprofitable to recite all the stories, true and false, which have gathered round the transactions of the two brothers, Khurshed and Asghar, and it is only necessary at first to ascertain what were the relations of the one to the other out of which the disputes have arisen.

First of all then, in 1875, the uncle of the two brothers, Husain Ali Khan, paid to the elder of them, Khurshed, the sum of Rs. 74,800, being the amount due to the two as their share of the profits of estates which their father and Husain, and afterwards the two brothers and Husain, had held jointly. From 1875 there was separation between Husain and the two brothers, but the two brothers remained joint in all their estate until 1882 and in business until the present dispute arose. Before speaking, however, of the relations between the two brothers as to estate and business generally it is convenient to complete the narrative of the Rs. 74,800 which came from the uncle into the hands of Khurshed. In a case abounding in mutual accusations of forgery and perjury, the main facts about this money are undisputed. That the greater part of it, *viz.* Rs. 60,000 was deposited in the Bank of Upper India and the rest, *viz.* Rs. 14,800, with two native firms of bankers at Meerut is certain. The sequel as to Rs. 60,000 needs only to be told briefly in order to its being dismissed from further consideration. It was given by Khurshed to the other respondent, Muzaffar, his son, but as Khurshed admits his liability to account for it, the whole history of Muzaffar's dealings with it has no further relation to the present dispute. There was a dispute as to what

became of the Rs. 14,800, but this is the sole controversial survival of the subject-matter of the first suit; *viz.* the Rs. 74,800 which came to the brothers from their uncle Husain, and it is ultimately dealt with in the account.

Turning now to the general relations between the two brothers the facts are simple. They were joint in estate (as has already been said); they owned considerable property in the district of Muzaffarnagar; both were in Government service, employed in different districts, and one was at home at one time and another was at another. It resulted from these mutual relations and similar engagements, that the one acted for the other in the receipt of the profits of their estate, and when necessary for more important matters, powers-of-attorney were granted by the one to the other. This is common ground and the fierce controversies in this suit are as to which brother in certain specified cases collected moneys belonging to both. In 1882 the greater part of the landed property belonging to them was divided between them; but they continued joint in other matters; and the growing distrust between the two did not produce an actual rupture until the litigation began in 1885.

In this state of facts the resulting liability of either party to account for his receipts is clear; and, given appropriate action or actions to enforce those liabilities, then the questions are (1) is either claim to account barred by limitation (2) or by settlement of accounts, and if not (3) what is the state of accounts? It will be found that in whatever other social or legal duty the parties have come short, they have not failed to sue enough actions to determine their rights, and some of the questions which were agitated as a defence to the first action are entirely superseded by the ample means ultimately afforded the Courts for doing complete justice.

The first suit (No. 189 of 1885) related to the Rs. 74,800 which Khurshed received from Husain. The plaint was filed by Asghar on the 22nd of December 1885, and asked for a decree against Khurshed for Rs. 37,400, being half of the Rs. 74,800, with interest, other decrees being asked to the effect of tracing and attaching the money in the form in which it had been invested by Khurshed's son, Muzaffar, who was made a defendant.

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For reasons already indicated, it is only necessary to follow the progress of the litigation between the two brothers, for the claim against Muzaffar comes to nothing. Kurshed's written statement presented a perfectly definite theory of the case. So far from his being indebted to Asghar, Asghar was largely indebted to him, to the amount of more than a lakh of rupees, the details of which were given in an account produced. This being so, the Rs. 74,800 which came from Husain had, to the extent of Rs. 60,000, been justly appropriated by Khurshed and as it happened had been given to Muzaffar. The rest (Rs. 14,800) had been spent by Asghar and Kurshed jointly. On this statement of facts, besides limitation, Khurshed pleaded that the brothers had been joint owners, that there must be a general account between them as partners, and that no action could lie for what was only one item in an account. On this last point it is sufficient to say that, whether good or bad, it is superseded by the fact that a cross action was brought by Khurshed to enforce the claims originally stated in support of his defence.

A minor incident of this defence must here be noted, as it bears very directly on one of the keenest controversies in the case. With Khurshed's written statement he produced a letter, dated the 9th of November 1885, written by himself and expressing a wish for a prompt settlement of accounts and having endorsed on it a reply by Asghar acquiescing and saying, "Please settle the account. I am responsible for what may be found due by me." This document was filed on the 23rd of February, 1886, and of its relevancy in support of the claim for an account there can be no doubt. The Court called on the appellant (plaintiff) for a replication and on the 31st of March 1886 he filed a written statement in which *(inter alia)* he denied the partnership and the receipt of any of the Rs. 14,800 "does not accept the correctness of the defendant's allegations *(a)* that the plaintiff received Rs. 1,08,040 from the defendant in accordance with the inclosed list" and (after other non-admissions) the replication proceeded:—

"6. The fact is this, that all the accounts were settled between the parties subject to the qualifications and statements contained in the plaint after inspecting and examining the *siahas* and registers of account (which the defendant has refused to produce on the plaintiff's application) as detailed

in the list signed by the parties annexed to the written statement, and that the sum due by either party were set off, and that the defendant executed the enclosed note-of-hand in favour of the plaintiff as a memo. to secure the above-mentioned item. The present allegations of the defendant, after such clear and distinct proceedings, are very surprising."

Along with this replication, *i.e.* on the 31st of March, 1886, was produced the following letter :—

"My dear brother, dearer than life, Syed Asghar Ali. May he live long !

"With prayers for your long life I inform you that whatever account was between you and me has been settled, *i.e.* I have received the entire amount due and have understood my private account, the account of my son Muzaffar, the joint account and the account of the *siaha* deeds, &c. The whole of the aforesaid account with the exception of the joint money amounting to Rs. 74,800, received on the 8th of June, 1875, and deposited in the Bank and credited with mahajans, and the deed of Ganga Charan has been settled. Nothing has remained unpaid.

"I have therefore written this memo. and affixed one anna stamp to it.

"(Sd.) ——(Illegible.)

"Dated the 13th of March 1885."

And also the following "list" :—

No. 160.—List of items realized by Syed Khurshed Ali Khan and Syed Asghar Ali Khan, which were allowed credit for at the time of the private adjustment.

Receipts on accounts of items due to Syed Kurshed Ali Khan by Syed Asghar Ali Khan on private account.	Rs.	a.	p.
On account of the decree passed against Musammat Jajbi Begam, wife of Inayat Husain, *rais* of Kwol (?)	9,743	7	4
On account of bond executed by Raja Raza Ali, *rais* of Bundora	10,500	0	0
On account of the sale-deed of Nagla, &c., executed by Raja Raza Ali...	1,200	0	0
On account of the receipt from the shop of Bansidhar and Sheo Prasad, bankers of Meerut. Out of Rs. 22,110, after deducting Rs. 30 which were paid for the Umballa journey under the account of the said bankers ...	11,025	0	0
On account of the profits of the villages for 1283 fasli ...	1,799	8	9
Total	34,268	0	1

Receipts on account of items due to Syed Asghar Ali Khan by Syed Kurshed Ali Khan on private account.	Rs.	a.	p.
On account of the price of the house, situate in Meerut. Out of Rs. 6,000 Syed Khurshed Ali Khan received from Syed Husain Ali Khan	3,000	0	0
Out of Rs. 7,374 on account of the bond executed by Syed Ewaz Ali, mukhtar'am of the parties (Rs. 3,687) were paid to Lala Harsahai Mal, banker of Meerut	3,687	0	0
On 4th April 1881, received (Rs. 2,847-12) out of Rs. 5,694-8 on account of the proportionate balance of the judgment-debt, due by Syed Wazarat Husain ...	2,847	12	0
On 4th April 1881, Syed Khurshed Ali Khan received (money) on account of the judgment-debt due by Basharat Husain. Out of it Rs. 10,000 was credited to the shop of Bansidhar, Sheo Prasad. A moiety of Rs. 9,346-2-3 ...	4,673	1	3
On account of bond executed by Nawab Azmat Ali Khan, *rais* of Karnal	20,000	0	0
Total ...	34,207	13	3

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The following were the issues settled :—

"1. Whether the objection taken on behalf of Muzaffar Ali Khan, defendant, as to misjoinder of claims and parties is correct ?

"2. What were the relative positions of the parties when the money was drawn from Husain Ali Khan and deposited at another place, and is any portion of claim affected by time ?

"3. Whether the parties were partners and whether a settlement was made as to the item objected to, or a full adjustment of the former accounts had been made under the *rukka*, dated the 13th of March 1885, referred to by the plaintiff ?

"4. Whether the item in question was deposited in the Meerut Bank in the names of the parties or in the name of defendant No. I, whether the plaintiff was a sharer and entitled to the extent of one-half of it, or with reference to the account produced by defendant No. I nothing was due to the plaintiff out of the aforesaid item, and whether the said deposit item was drawn and transferred *malâ fide* and secretly, or with the knowledge of the plaintiff ?

"5. Whether the item of Rs. 14,800 held in deposit by the firms was drawn by the parties or by the defendant alone ?

"6. Whether the defendant can, under section 111, claim a set-off of the items set up by him in the plaintiff's account, and whether the items alleged by the defendant are also affected by time ?

"7. Whether the plaintiff has, as alleged by him, a right for hypothecation as to the property mortgaged by Chaudhri Sher Singh and others on account of the money due to him, and whether the mortgage was taken for this very money ?

"8. Whether the claim for interest is correct according to practice ?

"9. What decision should be made as regards the defendant's application for costs ?"

The defendant being called on to admit or deny certain documents declared the *rukka* of the 13th of March and the "list of items" to be fabricated. In like manner the plaintiff put among the documents not admitted by him the *rukka* of the 9th of November, 1885, with reply. On the 9th of November, 1888, a cross action (No. 211) was brought by the respondent Khurshed against the appellant. It claimed rendition of accounts and payment of Rs. 74,030. For practical purposes the state of accounts upon which this sum was brought out was the same as that set out in the defence to the suit of the appellant.

This action merely restated the controversy between the parties in another form, and it is only necessary to note that the appellant in defence pleaded limitation.

Another suit was brought by the appellant against the respondents; but it is unnecessary to deduce the procedure. The

evidence taken was made to apply to all three suits, and the suits were kept together in the subsequent procedure. The appeals ultimately taken have been consolidated. It will simplify the narrative if in the meantime the original action be mainly attended to.

Evidence was taken before the Subordinate Judge and many witnesses were examined, whose credibility has been vehemently impugned. It was not until the 15th of September 1890 that the Subordinate Judge pronounced his first judgment, and by it he dismissed the suit (189) on the ground of limitation. Against this the appellant (plaintiff) appealed to the High Court and on the 16th of January 1893 the High Court set aside the decree and remanded the case under section 562 of the Civil Procedure Code to be tried promptly on the merits and according to law.

On the 15th of September 1893 the Subordinate Judge decided in favour of the appellant for the full amount of his claim as against Khurshed, but dismissed the suit as against Muzaffar. On appeal the High Court on the 24th of April, 1896, referred the case to the lower Court for the purpose of finding which, if any, of the items set forth in the list appended to the written statement filed by Khurshed are due to him by Asghar. They added, "Such finding will be irrespective of any plea of limitation that may be raised on behalf of Asghar Ali." Their Lordships in passing must observe that while in the present instance it may not have led to miscarriage, this was not the proper order to be pronounced, and it was irregular to take the account irrespective of the plea of limitation.

The High Court, however, did much more than appears from the mere terms of this remand; for by their judgment leading up to the remand they decided, adversely to the appellant, the most important question in the case, *viz.* the alleged settlement of account in March, 1885. They held on the evidence that no settlement had taken place, and they reached this result by holding that the ascertained facts about certain items of the list or statement (set out above) on which the settlement was said to have proceeded made it incredible that the settlement took place.

The appellant with some plausibility argued that the High Court has attached less importance to the positive evidence of

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the settlement than to antecedent improbabilities arising out of complicated transactions. He points to the substantial body of evidence of persons apparently of good repute who say they were present at the settlement and who depone to the writing and signature of the *rukka*, and he comments on the evidence being all one way as to the resemblance of the disputed writing to the undisputed signatures of Khurshed. He has examined with great elaboration the evidence bearing on the questions as to which of the disputed documents were forged and which of the witnesses are perjured, and whether an *alibi* has been made out by Khurshed. After very careful consideration their Lorships have come to the conclusion that the High Court was justified in rejecting the *rukka* on the grounds which are stated in their judgment. They consider the evidence as to certain of the items in the statement to be conclusive to the contrary of what is set out in the list and to be inconsistent with the existence of the alleged settlement. It is in their judgment less credible that Khurshed should have agreed to an acknowledgment to the direct contrary of known and recent facts of capital importance than that the documents are fabricated, and it has to be remembered that the opposite theory involves the believing a similar amount of fabrication and perjury to have taken place on the other side about the document of the 9th of November 1885. Their Lordships the more readily adopt the conclusion thus stated when they remember that the *rukka* and list of March 1885 were first heard of after the production by Khurshed of the *rukka* of November, 1885, in support of his counter-claim. For while it is true that in strictness they were not necessary to the plaint and appropriately supported the replication, yet it cannot escape notice that if they had been in existence they would inevitably have been in the mind of the plaintiff and would naturally have formed the starting-point of the narrative of his plaint, and the subsequent procedure before the Subordinate Judge indicates a similar lack of confidence by the appellant in a controversial weapon which if authentic was conclusive.

There remains the question whether Khurshed's claim is barred by the Limitation Act. The Subordinate Judge dismissed the suit as time-barred, but the High Court on the 9th of March,

1897, reversed this decree, and gave decree for Rs. 25,075 with interest. The question of limitation does not present much difficulty. Given the relations (which have been already stated) between these two brothers as regards their joint property, and it is apparent that they were agents the one of the other in dealing with the joint estate. Their Lordships are of opinion that the 89th article of the 2nd schedule of the Limitation Act, 1877, applies, for they hold the words "movable property" to include money. The evidence of Asghar shows that the relation of agency continued down to the institution of the suit and accordingly the plea of limitation fails. In this view it is unnecessary to rely on the acknowledgment of November, 1885, or to consider the attempt to read the date as being in fact 1884 instead of 1885. The sequel of the suit after this judgment of the High Court showed that the question of accounts was little controverted and their Lordships were not asked to consider it.

The result of the whole matter is that Khurshed is entitled to what has been awarded him and that Asghar fails in his suits. The several actions have been disposed of by the High Court in the appropriate manner. Their Lordships will humbly advise His Majesty that the appeals ought to be dismissed; and the appellant will pay the costs of the consolidated appeals.

Appeals dismissed.

Solicitors for the appellant:—Messrs. *Pyke* and *Parrott.*

Solicitors for the respondents:—Messrs. *Ranken, Ford, Ford* and *Chester.*

J. V. W.

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FULL BENCH.

Before Mr. Justice Knox, Acting Chief Justice, Mr. Justice Banerji and Mr. Justice Aikman.

SITA RAM AND OTHERS (PLAINTIFFS) *v.* MADHO LAL AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 60, 92, *and* 93 *—Mortgage—Redemption—Decretal money not paid in within the time limited by the decree—Decree not in accordance with the Transfer of Property Act—Subsequent suit for redemption not barred—Civil Procedure Code, sections* 13, 244*—Res judicata.*

The plaintiffs brought a suit for redemption of a usufructuary mortgage and obtained a decree for redemption, conditioned on their paying a certain sum within a time specified in the decree. This decree, however, instead of going on to direct that in default of payment by the due date the property should be sold, directed that if payment was not made within the time fixed the "judgment should be deemed to be non-existent." The plaintiffs did not pay the decretal amount within the time fixed, but some years afterwards brought a second suit for redemption. *Held* that the second suit was not under the circumstances barred, either by reason of anything contained in the Transfer of Property Act, 1882, or by section 13 or section 244 of the Code of Civil Procedure. *David Hay* v. *Razi-ud-din* (1) overruled. *Sami Achari* v. *Somasundram Achari* (2), *Periandi* v. *Angappa* (3), *Karuthasami* v. *Jaganatha* (4), *Ramunni* v. *Brahma Dattan* (5), *Ramasami* v. *Sami* (6), *Vallabha Valiya Rajah* v. *Vedapuratti* (7), *Nainappa Chetti* v. *Chidambaram Chetti* (8), *Chaita* v. *Purum Sookh* (9), *Doobee Singh* v. *Jowkee Ram* (10), *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (11), *Anrudh Singh* v. *Sheo Prasad* (12), *Muhammad Samiuddin Khan* v. *Mannu Lal* (13), *Dondh Bahadur Rai* v. *Tek Narain Rai* (14), *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (15), *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (16), *Maloji* v. *Sagaji* (17), *Roy Dinkur Doyal* v. *Sheo Golam Singh* (18) and *Nawab Azimut Ali Khan* v. *Jowahir Sing* (19) referred to.

THE facts of this case are as follows:—

On the 10th of May, 1848, one Kesri Narayan made a usufructuary mortgage of the property in suit in favour of Lekhraj,

* Second Appeal No. 651 of 1897, from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 22nd April, 1897, reversing a decree of Munshi Jwala Prasad, Munsif of Mahaban, dated the 23rd December 1896.

(1) (1897) I. L. R., 19 All., 202.
(2) (1882) I. L. R., 6 Mad., 119.
(3) (1883) I. L. R., 7 Mad., 423.
(4) (1885) I. L. R., 8 Mad., 478.
(5) (1892) I. L. R., 15 Mad., 366.
(6) (1893) I. L. R., 17 Mad., 96.
(7) (1895) I. L. R., 19 Mad., 40.
(8) (1897) I. L. R., 21 Mad., 18.
(9) N.-W. P., H. C. Rep., 1867, p. 256.
(10) N.-W. P., H. C. Rep., 1868, p. 381.
(11) N.-W. P., H. C. Rep., 1871, p. 62.
(12) (1882) I. L. R., 4 All., 481.
(13) (1889) I. L. R., 11 All., 386.
(14) (1899) I. L. R., 21 All., 251.
(15) (1883) I. L. R., 7 Bom., 467.
(16) (1886) I. L. R., 10 Bom., 461.
(17) (1888) I. L. R., 13 Bom., 567.
(18) (1874) 22 W. R., C. R., 172.
(19) (1870) 13 Moo. I. A., 404.

the predecessor in title of the defendants-respondents, to secure a loan of Rs. 308. Sita Ram, plaintiff No. 1, and Thakur Das, father of the other plaintiffs, purchased Kesri Narayan's equity of redemption.

In 1869 Sita Ram and Thakur Das brought a suit against the defendants for redemption of the mortgage of 1848. In that suit the defendants pleaded that a later mortgage-deed for Rs. 800 had taken the place of the mortgage of 1848, and that the plaintiffs must pay that amount in order to redeem. This plea was sustained, and a decree was passed declaring the plaintiffs entitled to redeem and to recover possession of the property on condition of payment by them of the full amount of the mortgage money within one month. The decree went on to provide that if the money was not paid as directed, "this judgment shall, after expiry of the above-mentioned period, be considered as non-existent *(ma'adum)*." The plaintiffs failed to pay the money as directed.

No further proceedings were taken in connection with the mortgage until the 26th of May, 1896, when a fresh suit for redemption was instituted by Sita Ram and the representatives of Thakur Das. The plaintiffs alleged that the cause of action arose on the 12th of May, 1896, on which date the defendants refused to render an account and to allow redemption of the mortgage; and they prayed that accounts should be adjusted between the parties, and redemption decreed, without payment, if it were found that the mortgage had been satisfied out of the usufruct, or on payment by them of such part of the mortgage money as might be found due.

The defendants pleaded *inter alia* that the suit was barred by section 13 of the Code of Civil Procedure, and contended that, having regard to the result of the suit of 1869, the plaintiffs were not entitled to any relief.

The Court of first instance (Munsif of Mahaban) disallowed the defendants' contention and gave the plaintiffs a decree for redemption on payment by them of Rs. 500.

On appeal by the defendants the lower appellate Court (Subordinate Judge of Agra) following the case of *Hay* v.

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Razi-ud-din (1), reversed the Munsif's decree and dismissed the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Babu *Durga Charan Banerji* (with whom Munshi *Gokul Prasad)* for the appellants.

I submit that the Subordinate Judge is wrong. So long as there is no order debarring the plaintiffs of the right to redeem or no order for sale made upon the defendants-mortgagees' application in case of non-payment within the time fixed, the right to redeem is not extinguished. Sections 92 and 93 of the Transfer of Property Act, 1882, put the matter beyond any doubt. There was no such order in this case and therefore the plaintiffs are still entitled to redeem. The soundness of the ruling in *Hay* v. *Razi-ud-din* (1) has been doubted in *Dondh Bahadur Rai* v. *Tek Narain Rai* (2). I also rely upon *Sami Achari* v. *Somasundram Achari* (3), *Periandi* v. *Angappa* (4), *Karuthasami* v. *Jaganatha* (5), *Nainappa Chetti* v. *Chidambaram Chetti* (6) and *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (7), also upon *Raham Ilahi Khan* v. *Ghanita* (8) and *Nihali* v. *Mitter Sen* (9). These cases establish beyond doubt that the right to redeem not having been extinguished this second suit for redemption is maintainable.

Pandit *Sundar Lal* for the respondents. The mortgage merged in the decree which had been obtained on it. It ceased to exist independently of the decree. No suit to obtain another decree upon the same mortgage therefore lies: *King* v. *Hoare* (10), *Ex parte Tewings* (11), Leake on Contracts, p. 807, Chitty on Contracts, p. 780, Coote on Mortgages, pp. 707 and 708, Fisher on Mortgages, pp. 822 and 823, Brett's Commentaries on the present Laws of England, p. 361. The decree upon the mortgage having become time-barred gives the plaintiffs no right to bring a fresh suit. They could not have brought this suit so long as the decree for redemption previously obtained by them was alive.

(1) (1897) I. L. R., 19 All., 202.
(2) (1899) I. L. R., 21 All., 251.
(3) (1882) I. L. R., 6 Mad., 119.
(4) (1883) I. L. R., 7 Mad., 423.
(5) (1885) I. L. R., 8 Mad., 478.
(6) (1897) I. L. R., 21 Mad., 18.
(7) (1889) I. L. R., 11 All., 386.
(8) (1898) I. L. R., 20 All., 375.
(9) (1898) I. L. R., 20 All., 446.
(10) (1844) 13 M. and W., 494.
(11) (1883) L. R., 25 Ch. D., 338.

The fact that they allowed the decree to become time-barred by their own *laches* gives them no fresh right to sue. The decree in so far as it operates to merge the mortgage in itself is as effective after the time for executing it has passed as before the expiration of that period.

The decree in the previous suit was obtained before the passing of the Transfer of Property Act, 1882. There was then at least no difference between a decree on a mortgage and other decrees. The remedy of the decree-holders was to enforce the decree under section 244 of the Code of Civil Procedure. They could not again sue upon it. *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (1), *Ramasami* v. *Sami* (2), *Sheikh Golam Hoosein* v. *Musumat Alia Rukhee Beebee* (3), *Anrudh Singh* v. *Sheo Prasad* (4), *Maloji* v. *Sagaji* (5) and *Hay* v. *Razi-ud-din* (6). The mortgagor has a right to redeem by execution of the decree and not by suit.

The Transfer of Property Act, 1882, has made no alteration in the law. The right to redeem which is given by section 60 of the Act is exhausted when once a decree for redemption has been obtained.

The following judgments were delivered:—

KNOX, ACTING C.J.—The plaintiffs, who are now appellants, are the assignees of the equity of redemption over certain land situate in mauza Kopa, pargana Saidabad. They instituted the suit, out of which this appeal arises, and asked for a decree for enforcing the equity of redemption. Their suit has been dismissed, and the lower appellate Court has been guided to this decision by a precedent of this Court, *David Hay* v. *Razi-ud-din* (6). The Bench of this Court before which this second appeal first came for hearing, having doubts as to the soundness of the view held in *David Hay* v. *Razi-ud-din*, and it having been pointed out to them that there was a conflict of authority in the decisions of this Court regarding the point in issue, asked that the case might be referred to a Full Bench. What we now have to consider and determine is whether a mortgagor who has obtained a decree for redemption, which does not contain a provision that

(1) (1883) I. L. R., 7 Bom., 467.
(2) (1893) I. L. R., 17 Mad., 96.
(3) N.-W. P., H. C. Rep., 1871, p. 62.
(4) (1882) I. L. R., 4 All., 481.
(5) (1888) I. L. R., 13 Bom., 567.
(6) (1897) I. L. R., 19 All., 202.

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if payment is not made on the date fixed by the Court, the mortgagor shall be absolutely debarred of all right to redeem the property, and who has not enforced that decree and has not paid in the decretal amount within the time, can subsequently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained. According to the decision in *David Hay* v. *Razi-ud-din*, he cannot bring such a second suit. According to rulings of this Court prior in point of time to *David Hay* v. *Razi-ud-din*, he can.

It has been found that in 1869 the plaintiff-appellant, Lala Sita Ram, and the ancestor of the other plaintiffs-appellants, did institute a suit for redemption of this very mortgage, and that they did obtain a decree for redemption, but never put it in force. The mortgage was a usufructuary mortgage. In coming to a decision upon this point, I do not propose to go into the various precedents that are to be found in the reports. These have been very carefully considered and fully discussed by my learned brother Aikman, and I concur in the views he holds about them. I think it sufficient to consider the provisions of Act No. IV of 1882, which seem to bear upon this point. To my mind they return a sufficient and conclusive answer to the question referred. The first provision is that contained in section 60, which lays down that "at any time after the principal money has become payable the mortgagor has a right, on payment or tender at a proper time and place of the mortgage money, to require the mortgagee to deliver the mortgage-deed, if any, to the mortgagor, and where the mortgagee is in possession of the mortgage property, to deliver possession thereof to the mortgagor." No limitation is put upon this right, with the one exception that it must not have been extinguished by act of the parties or by an order of the Court. In the present case there is no question as regards the act of parties. The only point which will hereafter have to be considered is, whether the right has been extinguished by an order of a Court. As it is common ground that the mortgagee has not up to the present asked for an order that the mortgaged property be sold, it is not necessary to consider the provisions relating to such a circumstance, and I pass on to section 92, which directs that "in a suit for redemption if the plaintiff

succeeds the Court shall pass a decree ordering that an account be taken of what will be due to the defendant, and that upon the plaintiffs paying to the defendant, or into Court, the amount so due upon a day to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such persons as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and free from all incumbrances created by the defendant or any person claiming under him, and shall, if necessary, put the plaintiff into possession of the mortgaged property." Such a suit for redemption the plaintiffs did bring in the year 1869. A decree was passed in their favour, ordering very much as has been set out above. But whilst section 92 of the Transfer of Property Act goes on to enact that the decree passed in a case for redemption should direct that if payment of the amount found due is not made on or before the day fixed by the Court, the property was to be sold, the decree referred to in place of this ordered that if payment was not made, the judgment should, after the expiry of the time fixed in the decree, be considered as *ma'adum* or annihilated. If the Court which passed it had followed the law, then according to section 93 it was open to the mortgagee, when payment of the amount found due was not made, to apply for an order that the property or a sufficient part thereof be sold and the proceeds distributed as directed under section 93. Section 93 goes on further to enact that on the passing of such an order the plaintiff's right to redeem and the security shall, as regards property affected by the order, both be extinguished. Putting aside any other provisions of the law, the clear words of these sections would seem to be that until a mortgagee has applied for an order of sale under section 93, the plaintiff's right to redeem exists, and can at any time be enforced. There is a further clause in section 93, which seems to corroborate this view, and which permits a Court upon good cause shown and upon such terms, if any, s it thinks fit, from time to time to postpone the day originally fixed for payment. Every such postponement would prolong the existence of the plaintiffs' right to redeem. If it did not, it is difficult to assign any meaning or object to it, and this we cannot suppose of any piece of legislature.

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As no application had been made by the mortgagees for an order for sale up to the 26th of May, 1896, when they filed the present suit, it would follow that unless the plaintiffs' right to redeem be barred by some provision of law other than that contained in the Transfer of Property Act, his right to redeem was not extinguished. It was unimpaired, and could be enforced by suit. In *David Hay* v. *Razi-ud-din*, where the opposite view was held, it was admitted that there are cases which support this contention, namely, the cases of *Sami Achari* v. *Somasundram Achari* (1), *Periandi* v. *Angappa* (2), *Rammuni* v. *Brahma Dattan* (3), and also *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (4). The learned Judges, however, who decided the case of *David Hay* v. *Razi-ud-din* held that it was the intention of the Legislature as expressed in section 92 and section 93 of the Transfer of Property Act that there should be one suit only for a redemption. They do not point out upon what portions of the sections above cited they held this view, and it must be remembered that in the case they then had to decide the decree under appeal did not specify what should take place in the case the mortgage money was not paid within the period limited in that respect. Otherwise it might be assumed that they based their judgment upon the concluding paragraph of section 92. I need not consider here what would be the result if, in the case under appeal, the decree had been made in strict accordance with law and had provided that the property was to be sold. This point does not arise. The learned Judges in *David Hay* v. *Razi-ud-din* seem to have based their decision upon the reading they put upon sections 92 and 93 of the Transfer of Property Act, the principles contained in section 244 of the Code of Civil Procedure, and the fact that the failure by a mortgagor to comply, whatever that may mean, with his decree for redemption within time, cannot give him a fresh cause of action. His original cause of action, they considered, was extinguished. It is difficult to understand how they held this in the face of the words contained in section 93—"the plaintiff's right to redeem shall be extinguished." These words would be pure surplusage if the cause of action

(1) (1882) I. L. R., 6 Mad., 119.
(2) (1883) I. L. R., 7 Mad., 423.
(3) (1892) I. L. R., 15 Mad. 366.
(4) (1889) I. L. R., 11 All., 286.

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merged in the decree, or if section 13 of the Code of Civil Procedure had any similar effect. On the contrary, it would appear that the words above quoted in section 93 were purposely inserted in order to remove a particular case of a suit for redemption from objections which might be raised under section 13 of the Code of Civil Procedure. Again, as regards the difficulty felt in connection with the principles contained in section 244 of the Code of Civil Procedure, it must be remembered that decrees in redemption suits differ from ordinary decrees, in that they contain provisions providing for a portion of them becoming incapable of execution under certain contingencies. By their own internal virtue, so to speak, they make it impossible for questions relating to the execution, discharge or satisfaction of the decree to arise, inasmuch as they provide that upon a decree-holder not making payment on a day fixed by the Court, all advantages which accrued to him, and which could be enforced by him under the decree, come to a complete end. In the present case, of course, the decree was of an extraordinary kind ; but even so, the terms in which it was couched were of a nature which preclude any question arising of execution, discharge or satisfaction of that particular decree by the decree-holder. With due respect to the learned Judges who decided *David Hay* v. *Razi-ud-din*, I cannot bring myself to believe that it was the intention of the Legislature as expressed in sections 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. The principles of section 244 of the Code of Civil Procedure appear to me to be excluded under the express words which allow the mortgagor's right to redeem to continue alive and operative until extinguished by an order under section 93. It is true that where a Court has once adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and were heard and determined, become *res judicata* and cannot be reopened ; but unless there has been a determination that the mortgagor has no right to redeem, there would still remain one other issue in a subsequent suit which would not be *res judicata*, and which would have to be heard and determined. In a second suit for redemption there would always be the question to be tried whether the plaintiff has or has not a right to redeem

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reserved to him by law until the mortgagee has applied for an order for sale. This issue would naturally not have been, and could not have been, in issue in the former suit, and could not therefore have been heard and determined. The Court would not be by section 13 debarred from trying that issue. It has not been suggested that there is any other order of the Court which stands in the way of the mortgagor's right to redeem. I am therefore of the same opinion as my learned brothers, that in the present case the mortgagor could bring the second suit for redemption, and I concur with them in the order proposed.

BANERJI, J.—This appeal raises the question whether a mortgagor, who, has obtained a decree for redemption, and has failed to comply with the conditions imposed in it in regard to the payment of the mortgage money, is precluded from maintaining a second suit for the redemption of the same mortgage.

If the decree in the first suit provides in distinct terms, as it did in *Rasmasami* v. *Sami* (1) that in case of default in payment the mortgagor "will be debarred from redeeming" the mortgaged property afterwards, a second suit would be clearly barred under the rule of *res judicata*, no matter whether the decree was or was not passed in accordance with law. It is conceded that the decree in the former suit in this instance was not of that description. The former suit was brought in 1869 by Sita Ram, one of the present plaintiffs, and Thakur Das, the predecessor in title of the other plaintiffs, to redeem a mortgage of the 10th May, 1848, made by Keshri Narayan for Rs. 308. It was found that the said mortgage had been superseded by a subsequent mortgage, dated the 15th of February, 1853, for Rs. 800. The decree of the Court of first instance made on the 18th of March, 1869, and affirmed on appeal on the 27th of July, 1869, provided for redemption upon "payment within one month of the amount of the mortgagee money alleged by the defendants;" and it further provided that if payment was not made within the term fixed the "judgment should be deemed to be non-existent." As I read this decree the result of the non-payment of the mortgage money within the period of one month

(1) (1893) I. L. R., 17 Mad., 96.

fixed in the decree was, that the parties were relegated to the position in which they were before the decree was passed, that is to say, the relation of mortgagor and mortgagee was to subsist between them as before. It could not be said by any stretch of reasoning that the decree declared the right of redemption to be foreclosed, or that it had the effect of merging the mortgage in the decree. Having regard, therefore, to the terms in which the decree of 1869 was passed, I am unable to hold that the said decree is a bar to the maintenance of the present suit.

This suit was instituted in 1896 under the Transfer of Property Act. Section 60 of that Act confers on the mortgagor a right to redeem "at any time after the principal money has become payable," provided that the said right "has not been extinguished by act of the parties or by operation of law." It is admitted in this case that the plaintiff's right of redemption has not been put an end to by the act of the parties. Has it been extinguished by operation of law? This question has been fully dealt with by my brother Aikman, whose judgment I have had the advantage of reading. I agree with him in all that he has said on this point. The rulings of the Madras High Court, which he was considered in detail, are consistently to the effect that in the case of a usufructuary mortgage the right to redeem is not extinguished, unless, upon default in payment on or before the day fixed, the Court passes an order that the mortgaged property or a sufficient part thereof be sold as provided in section 93. The judgment of Muttusami Ayyar, J., in *Ramunni* v. *Brahma Dattan* (1), is instructive, and I entirely agree with the views of the learned Judge. It is clear from the provisions of the Transfer of Property Act that the only orders which under the Act extinguish the right to redeem are—(i) an order absolute for foreclosure under section 87 in a suit for foreclosure, (ii) an order absolute for sale under section 88, and (iii) an order for forelosure or sale in a mortgagor's suit for redemption. This was clearly pointed out in *Dondh Bahadur Rai* v. *Tek Narain Rai* (2). Under section 93 an order for foreclosure can only be passed if the mortgage is not simple or usufructuary. In the case of such mortgages the only order which has the

(1) (1892) I. L. R., 15 Mad., 366. (2) (1899) I. L. R., 21 All., 251.

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effect of extinguishing the right to redeem is the order for the sale of the mortgaged property or a sufficient part thereof. So long as such an order has not been applied for and obtained the right to redeem is not extinguished, and therefore the mortgagor is entitled under section 60 to bring a suit to enforce that right. This effect of section 93 was evidently overlooked in the ruling of this Court in *David Hay* v. *Razi-ud-din* (1). With all deference to the learned Judges who decided that case, I am unable to agree with them. Their view is in direct conflict with the provisions of the Transfer of Property Act. They have referred to "the law as administered in such matters in England," but they were oblivious of the fact that whereas in England "the dismissal of the action to redeem by reason of default in payment of the money, or for any other cause than for want of prosecution, operates as a judgment of foreclosure" (see Fisher's Law of Mortgage, 5th Edition, p. 965), there can be no decree of foreclosure under the Transfer of Property Act in the case of a usufructuary mortgage. The observation of the learned Judges that a mortgagee may be harassed by numerous suits if the mortgagor were permitted to institute repeated suits for redemption, has been fully answered by my brother Aikman, and in the judgment in *Dondh Bahadur Rai* v. *Tek Narain Rai* (2) referred to above. It will be entirely in the power of the mortgagee to prevent such suits by obtaining an order for the sale of the mortgaged property. As for the provisions of the Code of Civil Procedure to which reference has been made by the learned Judges I am unable to hold that they have any bearing on the question. The operation of section 13 of the Code would depend upon the nature of the decree made in the previous suit in each instance. If, for example, the first suit is dismissed on the ground that the plaintiff has no right of redemption, he will be precluded by the operation of that section from bringing a second suit for redemption. Again, if the decree declares that upon default being made in the payment of the mortgage money, the plaintiff will be foreclosed of his right of redemption, and that decree is allowed to become final, although it is not in accordance with law, the plaintiff will not be entitled to maintain another

(1) (1897) I. L. R., 19 All., 202. (2) (1899) I. L. R., 21 All., 251.

suit. But where the decree has been framed in the terms of section 92 of the Transfer of Property Act the only order which can extinguish the mortgagor's right to redeem in the case of a usufructuary mortgage is an order for sale under the fourth paragraph of section 93. That section leaves no room for doubt that the mere fact of the non-payment of the mortgage money on or before the date fixed does not extinguish the mortgagor's right of redemption, and vest the mortgaged property absolutely in the usufructuary mortgagee. The very fact that such a mortgagee can obtain an order for the sale of the mortgaged property shows that the ownership of the property, that is, the equity of redemption, is in the mortgagor until the order has been obtained, as the mortgagee could not apply for the sale of the property which had vested in himself. With reference to the contention of the learned advocate for the respondents, that after the mortgagor had obtained a decree for redemption his rights merged in the decree, and the only remedy available to him was the execution of the decree, it may be observed that this would be the case where the mortgage money has been discharged before suit, either by receipt of rent or by actual payment, and the decree passed is one for possession on the ground that the mortgage has already been redeemed. This was the case in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (1). But where a conditional decree has been passed the right to redeem is not extinguished until the result of the failure to perform the condition comes into operation, either under section 93 of the Transfer of Property Act, or under the terms of the decree. The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* relied on the ruling referred to above as supporting their view; but the true scope of that ruling has been pointed out by my brother Aikman, and it does not, in my opinion, help the case of the respondents. I am unable to hold that, having regard to the provisions of the Transfer of Property Act, the case of *David Hay* v. *Razi-ud-din* was rightly decided.

It was lastly urged on behalf of the respondents that the decree of 1869 was passed before the Transfer of Property Act came into force, and that before the enactment of that Act, a

(1) N.-W. P., H. C. Rep., 1871, p. 62.

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decree dismissing a suit for redemption operated as a decree for foreclosure. That may have been the case in the Bombay Presidency; but so far as these Provinces are concerned, there is no authority for holding that the rule on the subject which obtains in England was ever applied to suits in this country. In *Chaita* v. *Purum Sookh* (1), decided by Morgan, C.J. and Spankie, J., in 1867, it was held that the omission to execute a decree for redemption does not cause the interest of the mortgagor to cease to exist, and that he may still maintain another suit for redemption. In *Nawab Azimut Ali Khan* v. *Jowahir Sing* (2), their Lordships of the Privy Council did not consider the dismissal of a suit for redemption to be a bar to the maintenance of a subsequent suit for the same purpose. I may also refer to the decision of the Calcutta High Court in *Roy Dinkur Doyal* v. *Sheo Golam Singh* (3), decided in 1874, and I may remark that no case has been cited to us in which, before the passing of the Transfer of Property Act, the view contended for by the respondents and approved in *David Hay* v. *Razi-ud-din* was held in these Provinces.

I am of opinion that neither the provisions of law nor the terms in which the decree of 1869 was passed preclude the plaintiffs from maintaining the present suit. I would therefore accept the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure, allowing to the appellants the costs of this appeal. Other costs to follow the result.

AIKMAN, J.—This appeal arises out of a suit brought for the redemption of a mortgage. The plaintiff succeeded in the Court of first instance, but on appeal the learned Subordinate Judge reversed the decree of the Munsif and dismissed the suit. The plaintiffs have filed this appeal from the decree of the lower appellate Court. The learned Subordinate Judge relies on the judgment of this Court in the case of *David Hay* v. *Razi-ud-din* (4). That case undoubtedly supports the view taken by the Subordinate Judge. The plaintiffs, on the other hand, rely on an earlier judgment of this Court in the case of *Muhammad*

(1) N.-W. P., H. C. Rep., 1867, p. 256.
(2) (1870) 13 Moo., I. A., 404.
(3) (1874) 22 W. R., C. R., 172.
(4) (1897) I. L. R., 19 All., 202.

Sami-ud-din Khan v. *Mannu Lal* (1), which is as clearly in their favour as the other case is against them. Owing to this conflict of authority on a question of importance, the hearing of this appeal has been referred to a Full Bench of three Judges.

The following are the facts of the case:—

On the 10th of May, 1848, one Kesri Narayan made a usufructuary mortgage of the property in suit in favour of Lekhraj, the predecessor in title of the defendants respondents, to secure a loan of Rs. 308. Sita Ram, plaintiff No. 1, and Thakur Das, father of the other plaintiffs, purchased Kesri Narayan's equity of redemption.

In 1869 Sita Ram and Thakur Das brought a suit against the defendants for redemption of the mortgage of 1848. In that suit the defendants pleaded that a later mortgage-deed for Rs. 800 had taken the place of the mortgage of 1848, and that the plaintiffs must pay that amount in order to redeem. This plea was sustained, and a decree was passed declaring the plaintiffs entitled to redeem, and to recover possession of the property on condition of payment by them of the full amount of the mortgage money within one month. The decree goes on to provide that if the mortgage money is not paid as directed, "this judgment shall, after expiry of the above-mentioned period, be considered as non-existent" *(ma'adum)*. The plaintiffs failed to pay the money as directed. No further proceedings in connexion with the mortgage were taken until the 26th May, 1896, when the suit out of which this appeal arises was instituted. The plaintiffs alleged that the cause of action arose on the 12th of May, 1896, on which date the defendants refused to render an account and allow redemption of the mortgage. The plaintiffs prayed that accounts should be adjusted between the parties, and redemption decreed, without payment if it were found that the mortgage had been satisfied out of the usufruct, or on payment by them of such part of the mortgage money as might be found to be due.

The defendants pleaded that the suit was barred by section 13 of the Code of Civil Procedure, and contended that, having regard to the result of the suit of 1869, the plaintiffs were not entitled to

(1) (1889) I. L. R., 11 All., 386.

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any relief now. They also raised other pleas, which it is unnecessary to consider in this appeal.

The Court of first instance, relying on the decision in *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (1), repelled the plea that the suit was not maintainable owing to the previous litigation in 1869, and in the result gave the plaintiffs a decree for redemption on payment of Rs. 500.

On appeal the learned Subordinate Judge, following, as he was bound to do, the later ruling in the case of *David Hay* v. *Razi-ud-din* (2), sustained the plea that the previous suit barred the present suit, and set aside the Munsif's decree.

We have now to decide which of the conflicting views taken in the two cases referred to is correct.

I have no hesitation in coming to the conclusion that the decision in the earlier case is right. It is in accord with a long series of rulings of the Madras High Court, beginning with the case of *Sami* v. *Somasundram* (3) and ending with *Nainappa Chetti* v. *Chidambaram Chetti* (4). The learned Judges who decided the case in I. L. R., 19 All., observed that the view of the law to be found in these Madras cases is not supported by the law as administered in such matters in England. That is quite true. In England dismissal of a suit to redeem by reason of the non-payment of the money or for any other cause than for want of prosecution, operates as a judgment of foreclosure (*vide* p. 1187, Coote's Law of Mortgage, Vol. II, edn. 1884, and the cases quoted there). But when the learned Judges go on to say that the Transfer of Property Act also shows that a second suit to redeem cannot be maintained, I must join issue with them. I think precisely the opposite lesson is to be learnt from the Transfer of Property Act. Section 60 of the Act provides that the mortgagor has a right to redeem at *any time* after the principal money has become payable, provided that that right has not been extinguished by act of the parties or by order of the Court. In a suit for redemption the Court (*vide* section 92) makes a decree determining the amount to be paid for redemption and fixing the time within which that amount is to be paid, and if the mortgage be

(1) (1889) I. L. R., 11 All., 386.
(2) (1897) I. L. R., 19 All., 202.
(3) (1882) I. L. R., 6 Mad., 119.
(4) (1897) I. L. R., 21 Mad., 18.

simple or usufructuary, ordering that the property be sold unless the amount be paid as directed. The sale of the property on the application of the defendant is the penalty provided by law for the failure of the plaintiff to pay within the time fixed. Now, if the view taken by the learned Judges who decided the case in I. L. R., 19 All., be correct, the penalty in the case of a decree which does not, as required by law, contain an order for sale, is the total loss of the property—a result which I have no hesitation in saying is not contemplated by the Act. Even if the decree be properly framed in terms of section 92, the result would be the same, for the mortgagee has only to sit quiet and refrain from making an application under section 93, with the result that the property becomes his own.

It may well happen that when an account is taken in a suit for redemption, the result is to show that an amount is due from the mortgagor, which he for the time being is quite unable to raise within the period fixed. The law never intended that in such a case the mortgagor should be punished by the total loss of his property. Even when, after a properly-framed decree, the mortgagee applies under section 93 for sale, the order which the Court has to pass is that the property, *or a sufficient part thereof*, be sold. Any balance of the sale proceeds which is left after payment of the amount due to the defendant mortgagee, and the expenses of the sale, is paid to the plaintiff mortgagor, or other persons entitled to receive the same. And, as is clear from the fifth paragraph of section 93, it is the passing of an order under that section which extinguishes the plaintiff's right to redeem. The inference is, that the right to redeem is considered to subsist until an order under that section has been passed.

The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* observe that if the authorities which take an opposite view are good law, "a mortgagor is only limited as to the number of suits which he may bring by the length of his life, or by the sixty years provided by the Limitation Act." I think the fear here expressed is chimerical, for, as pointed out in the case of *Dondh Bahadur Rai* v. *Tek Narain Rai* (1), even if the liability to pay costs did not act as a deterrent to the mortgagor, the

(1) (1899) I. L. R., 21 All., 251.

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mortgagee could, by an application under section 93 of Transfer of Property Act, put a stop to any further litigation under the mortgage.

The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* rely on the Full Bench decision of this Court in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (1). The facts of that case are different from those of the present case and of the case in I. L. R., 19 Allahabad. The plaintiffs, relying on their proprietary title, had brought a suit to recover possession of mortgaged property on the ground that the mortgage had been satisfied. They succeeded in establishing this, and got an unconditional decree for possession. They allowed the period of limitation to expire without taking any steps to obtain possession, and then brought another suit based on their old title, and asking substantially for the relief which was sought for and obtained in the first suit. Such a case is, I think, not to be distinguished from an ordinary action in ejectment, in which a plaintiff gets a decree for possession of the property. If he takes no steps to execute that decree within the time allowed by law, he cannot by a fresh suit based either on the decree, or on his title as it stood at the time the first suit was brought, evade the law of limitation. It was so held by a Full Bench of this Court in *Doobee Singh* v. *Jowkee Ram* (2), and the Judges who decided *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* held that the decision in *Doobee Singh's* case governed the case before them.

It appears to me that when a Court by its decree pronounces a mortgage debt to be satisfied, and the mortgagor entitled to immediate possession, that is equivalent to a declaration that the relation between the parties of mortgagor and mortgagee has come to an end. The case is different when the decree declares that the mortgage debt is still unsatisfied. In that case the relation of mortgagor and mortgagee still subsists, and so long as that relation subsists, a mortgagor is entitled to claim redemption, provided his right to do so has not been extinguished by act of parties or by order of a Court.

In the present case it is not suggested that the mortgagor's right has been put an end to by the act of parties, and I fail to

(1) N.-W. P., H. C. Rep., 1871, p. 62. (2) N. W. P., H. C. Rep., 1868, p. 381.

discover anything in the decree in the previous suit which would extinguish it. It is, of course, possible that in a suit for redemption of a mortgage, under which possession has been given to the mortgagee, the decree of the Court may be so framed as to have the effect of extinguishing the mortgagor's right to redeem. Such was the case in *Ramasami* v. *Sami* (1) relied on by the respondent, where the decree declared that on the plaintiff's paying the amount found due within three months, he would be entitled to possession of the properties mortgaged, "and in default he will be debarred from redeeming them thereafter." Such a decree is not a proper decree to pass in a suit for the redemption of a usufructuary mortgage under the Transfer of Property Act, but if passed, and allowed to become final, it is clear that on the plaintiff's failure to pay within the time fixed it operates as a foreclosure decree, and his right to redeem is extinguished.

In the present case, had the decree of 1869 declared that on the plaintiffs' failure to pay within the time fixed the amount found due their right to redeem would be barred, the present suit would necessarily fail. But no such declaration was made. As stated above, the only result of default on the plaintiffs' part which the decree of 1869 declared would ensue was the wiping out of the judgment. I do not think that it can with any show of reason be maintained that this was an order of Court extinguishing the right to redeem.

Reference is made both in *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (2), and in the case in I. L. R., 19 Allahabad, to the Full Bench decision of 1871. But neither of these judgments adverts to the peculiar circumstance noticed above, namely, that in the Full Bench case the decree in the first suit was not a decree declaring the mortgagor entitled to redeem, but an unconditional decree for possession. Had it been a decree for redemption, it is possible that the decision of the Full Bench would have been different, for in 1867, Morgan, C. J. and Spankie, J., both of whom were parties to the Full Bench decision of 1871, had held in the case of *Chaita* v. *Purum Soo kh* (3), that the mere omission to execute a redemption decree does

(1) (1893) I. L. R., 17 Mad., 96. (2) (1889) I. L. R., 11 All., 386.
(3) N. W. P., H. C. Rep., 1867, p. 256.

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not cause the interest remaining in the mortgagor to cease to exist, and that in respect of such remaining interest he may maintain a fresh redemption suit, even if all rights under the old suit have been lost. "The inquiry," they say, "in the new suit, whether he is entitled to redeem, and on what terms, may not be the same as the inquiry in the former suit. A different state of circumstances may have arisen."

The learned Judges who decided the case of *David Hay* v. *Razi-ud-din* say that in their opinion it was the intention of the Legislature, as expressed in sections 92 and 93 of the Transfer of Property Act, that there should be one suit only for redemption. With all deference to the learned Judges, I am unable to find any indication in these sections of any such intention in the case of usufructuary mortgages. The language of section 93 points to an opposite conclusion. The second paragraph of that section provides that if payment is not made within the time fixed, the defendant mortgagee may apply for an order that the plaintiff, and all persons claiming through or under him be debarred absolutely of all right to redeem, *unless* the mortgage is simple or usufructuary. Nor am I able to follow the learned Judges in their opinion that it would be in contravention of the principles of section 244 of the Code of Civil Procedure to allow a second suit for redemption to be maintained, inasmuch as the question raised in the second suit is not a question relating to the execution, discharge, or satisfaction of the previous decree. The case would, of course, be different, were the second suit brought upon the decree in the first suit as a cause of action, as in *Doobee Sing* v. *Jowkee Ram* (1), and *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (2).

Nor am I able to see that section 13 of the Code of Civil Procedure would be any bar to a second suit for redemption. The decision in *Anrudh Singh* v. *Sheo Prasad* (3), merely followed the ruling of the Full Bench in *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee*, and no facts are given.

The case of *Gan Savant Bal* v. *Narayan Dhond Savant* (4), is in favour of the respondent. It follows the two cases last

(1) N. W. P., H. C. Rep., 1868, p. 381.
(2) (1886) I. L. R., 10 Bom., 461.
(3) (1882) I. L. R., 4 All., 481.
(4) (1883) I. L. R., 7 Bom., 467.

cited. Kemball, J, says :—"By reason of the default in payment of the money declared to be due within the time prescribed by law for the execution of decrees (no time having been fixed in the decree), the order for redemption must be taken to have operated as a judgment of foreclosure." This view, as shown above, is not in accord with the Transfer of Property Act, which, it should be noted, had not been extended to the Bombay Presidency when that case was decided. This case was followed in *Maloji* v. *Sagaji* (1), where, however, the opinion was only an *obiter dictum*. The cases in which an opposite view has been taken may now be shortly referred to. In the case of *Roy Dinkur Doyal* v. *Sheo Golam Singh* (2), the plaintiffs had brought a suit to recover possession of mortgaged property on the allegation that the amount due under the mortgage had been discharged by the usufruct of the property. The Court found that a sum of Rs. 4,824-14-9 was still due under the mortgage, and gave the plaintiffs a decree for possession on condition of their depositing that amount. The plaintiffs failed to pay in this amount. Four years after the decree had been passed they asked for possession in the execution department on the plea that the amount mentioned in the decree had by that time been satisfied out of the usufruct, but their application was rejected. They then filed a fresh suit for possession, which was dismissed by the Court of first instance on the ground that it was barred by section 2, Act No. VIII of 1859, which precluded a Court from taking cognizance of a suit brought on a cause of action which had been previously heard and determined by a Court of competent jurisdiction in a former suit between the parties.

In appeal the decision of the Subordinate Judge was reversed by Phear and Norris, JJ. They say :—"What was the cause of action which was heard and determined between the present parties in the former suit, and what is the cause of action which is put forward by the plaintiffs in this present suit, and which they ask now to have heard and determined? It seems to us plain that the principal cause of suit is the relation which subsists between the parties as mortgagor and mortgagee, and the consequent right on the part of the mortgagor at all reasonable times

(1) (1888) I. L. R., 13 Bom., 567. (2) (1874) 22 W. R., C. R., 172.

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to ask for an account from the mortgagee. * * * The former suit effected an adjustment of account up to the date of 18th April, 1868. The substantial cause of action in the present suit, that which the plaintiff desires to have heard and determined, is the state of accounts which has arisen since the 18th April, 1868, obviously an entirely fresh cause of action. The matter which the Court is asked in this suit to hear and determine is a matter which has arisen and came into being since the matter of the last suit was heard and determined."

These observations, with which I agree, might, *mutatis mutandis*, be applied to the case before us. The learned Judges further point out that the first decree did not put an end to the relation of mortgagor and mortgagee, and that the Court by that decree did not pretend to foreclose the plaintiffs' right of redemption, in the event of his not paying the money then declared to be due.

In *Sami* v. *Somasundram* (1), Turner, C. J. and Muttusami Ayyar, J., held that the fact that the plaintiff had previously got a decree declaring him entitled to redeem and recover possession on making a certain payment, which payment he omitted to make, did not debar him from bringing another suit for redemption, the first decree not having declared that the mortgagor would be foreclosed if he did not exercise the right of redemption therein given him.

In a similar case *Periandi* v. *Angappa* (2), decided by the same learned Judges, a similar view was taken. It was pointed out that, as the decree in the first suit did not create a foreclosure it did not alter the legal relation which had subsisted between the parties prior to the suit, and that the incidents of the relation exist so long as the relation exists.

In *Karuthasami* v. *Jaganatha* (3), (Turner, C. J., and Hutchins, J.) the same view was taken. Turner, C. J., had been a party to the Full Bench decision of this Court in 1871, and in this judgment it is pointed out that in the Full Bench case the original suit was not, strictly speaking, a suit for redemption, but a suit to recover property on which the mortgage debt had,

(1) (1882) I. L. R., 6 Mad., 119. (2) (1883) I. L. R., 7 Mad., 423.
(3) (1885) I. L. R., 8 Mad., 478.

it was alleged, been discharged, and the decree was absolute and unconditional.

These cases were followed in *Ramunni* v. *Brahma Dattan* (1), by Muttusami Ayyar and Best, JJ. In his judgment Muttusami Ayyar, J., points out the marked difference between the law of mortgage as administered in England and that contained in the Transfer of Property Act.

The question raised in this appeal did not directly arise in the case *Vallabha Valiya Rajah* v. *Vedapuratti* (2), but both Parker and Shephard, JJ., expressed an opinion that the failure of the mortgagor to pay in the amount found due on the mortgage within the time fixed by the decree did not of itself put an end to his right to redeem.

In the case of *Mainappa Chetti* v. *Chidambaram Chetti* (3) the same contentions were put forward on behalf of the mortgagee as are advanced in this case. It was urged that the only remedy the mortgagor had was to have executed the decree in the first suit, that that decree being now barred, the mortgagor had lost his right to redeem, and could not fall back on the original mortgage and sue to redeem it, it having become merged in the decree. The learned Judges (Benson and Boddam, JJ.), repelled these pleas, holding that if the mortgagor failed to exercise the right of redemption given him by the decree, he, in effect, declined to put an end to the relation of mortgagor and mortgagee, that though the decree may become barred, the legal relation of mortgagor and mortgagee continues, "and the mortgagor may in a fresh suit again assert his right to redeem on payment of such sum as then may be due, which sum may on taking an account be greater or less than the sum which was requisite under the former decree."

In the case last cited reliance was placed on behalf of the mortgagee on the decision of the Privy Council in *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (4). That was a case in which a decree for redemption had been passed and not executed. After the period of limitation for execution of the decree had expired a second suit for redemption was brought, not upon

(1) (1892) I. L. R., 15 Mad., 366.
(2) (1895) I. L. R., 19 Mad., 40.
(3) (1897) I. L. R., 21 Mad., 18.
(4) (1886) I. L. R., 10 Bom., 461.

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the mortgage, but upon the decree. The Courts in India held that such a suit would not lie. That view was affirmed by the Privy Council. On behalf of the mortgagor it was contended that, if he could not succeed in his suit based on the decree, he was entitled to fall back on the mortgage and redeem that. The ground upon which their Lordships overruled this plea was, not that a second suit for redemption would not lie, but that in putting forward such a contention the plaintiff was setting up a different case from that which had been set up in the lower Court, and on which the case had been tried and decided. Their Lordships did not, it is true, express any opinion as to whether a second suit for redemption would lie, but they expressed no disapproval of the decision in I. L. R., 7 Mad., 423, which was cited in support of the contention.

In the case of *Muhammad Sami-ud-din Khan* v. *Mannu Lal* (1), the mortgagors came into Court claiming possession of their property, which had been usufructuarily mortgaged, on the allegation that the amount due under the mortgage had been satisfied out of the usufruct. The Court found that a sum of Rs. 1,999-10-6 was still due to the mortgagees, and gave the plaintiffs a decree conditional on their paying this amount into Court within a time fixed, failing which payment the suit was to stand dismissed. The money was not paid in, and consequently the suit stood dismissed from the expiration of the period fixed. A second suit for redemption was dismissed by the lower Court on the ground that the right of redemption was extinguished by the order passed in the previous suit. The learned Judges (Straight and Brodhurst, JJ.), after a consideration of the previous rulings of this Court, and the provisions of the Transfer of Property Act, held that the right of redemption was not extinguished by what had taken place in the previous suit, and that the second suit was maintainable.

I think it has been shown above that the weight of authority is against the view taken by the learned Judges in the case of *David Hay* v. *Razi-ud-din*, and further that that decision is not in consonance with the provisions of the Transfer of Property Act.

(1) (1889) I. L. R., 11 All., 386.

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Dissenting, therefore, from that decision, I would allow this appeal, and, setting aside the decree of the lower appellate Court, would remand the case to that Court under the provisions of section 562 of the Code of Civil Procedure, for decision of the remaining pleas raised in the memorandum of appeal to it. I would allow the appellants the costs of this appeal, and direct that the costs in the Courts below abide the event.

BY THE COURT.—The order of the Court is, that the decree of the lower appellate Court is set aside, and the case remanded to the lower appellate Court under the provisions of section 562 of the Code of Civil Procedure for re-admission upon its file of pending appeals, and for decision of the remaining pleas raised in the memorandum of appeal. The appellants will get the costs of this appeal. The costs of the Courts below will abide the event.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

1901
July 17.

Before Mr. Justice Banerji and Mr. Justice Aikman.

CHHIDDU AND ANOTHER (PLAINTIFFS) *v.* NAUBAT AND OTHERS (DEFENDANTS).*

Hindu Law—Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan.

According to the Mitakshara law the share which the mother in a joint Hindu family obtains on partition, after the death of the father, of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband. *Bilaso* v. *Dina Nath* (1), *Bhagwandeen Doobey* v. *Myna Baee* (2), *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram* (3), *Chotay Lall* v. *Chunno Lall* (4), *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (5), *Mohabeer Pershad* v. *Ramyad Singh* (6), *Lalljeet Singh* v. *Raj Coomar Singh* (7), *Sheodyal Tewaree* v. *Judoo Nath Tewaree* (8), *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry* (9), *Beni Parshad* v. *Puran Chand* (10) and *Ganpat Rao* v. *Ram Chandar* (11) referred to.

(1) (1880) I. L. R., 3 All., 88.
(2) (1867) 11 Moo. I. A., 487.
(3) (1866) 11 Moo. I. A., 139.
(4) (1878) L. R., 6 I. A., 15.
(5) (1881) I. L. R., 3 Mad., 290.
(6) (1873) 20 W. R., 192.
(7) (1873) 20 W. R., 336.
(8) (1868) 9 W. R., 61.
(9) (1889) I. L. R., 16 Calc., 758.
(10) (1895) I. L. R., 23 Calc., 263.
(11) (1888) I. L. R., 11 All., 296.

* Appeal No. 24 of 1900, under s. 10 of the Letters Patent.

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ONE Ganga Ram died leaving two sons, Gopal and Bhupal, by his first wife, and a third, Chunni, by his second wife, Musammat Udni, who also survived him. After his death a partition of the property of Ganga Ram took place, one half thereof being recorded in the names of the sons by the first wife and the other half being recorded as held in equal shares by Chunni and his mother, Musammat Udni. Musammat Udni died in 1869, and, Chunni also dying, the quarter share of which she was in possession was taken by the three sons of Chunni. The plaintiffs in this case, the sons of Gopal and Bhupal, sued to recover two-thirds of the share which had been of Musammat Udni in her life-time, on the ground that the share only came to her by way of maintenance and she had only a life-interest in it, and that after her death it should be divided amongst the grandsons of Ganga Ram *per stirpes*.

The Court of first instance dimissed the suit, holding that the fathers of the plaintiffs had separated from their father, Ganga Ram, during his life-time, and that the defendants had acquired a title by adverse possession.

The plaintiffs appealed, and the lower appellate Court (Subordinate Judge of Aligarh) came to the conclusion that after the death of Ganga Ram a partition took place between his sons, under which the one-fourth share in question had been assigned to Musammat Udni, and holding that Udni had only a life-interest in the share, which, after her death, would revert to the heirs of Ganga Ram, gave the plaintiffs a decree.

The defendants appealed to the High Court. The main plea urged on their behalf was that the share which fell to Musammat Udni was her *stridhan*, and therefore the plaintiffs, sons of her stepsons, had no right to a share in it. The appeal was heard by a single Judge, who reversed the decree of the Subordinate Judge and restored that of the Court of first instance (1). From this decision the plaintiffs appealed under section 10 of the Letters Patent.

Dr. *S. C. Banerji* (with whom Munshi *Gulzari Lal*) for the appellants.

I maintain that the share taken by a Hindu mother on partition among her sons and stepsons is not what is technically known to the law as *stridhan*.

(1) Weely Notes, 1900, p. 114.

The authorities upon which the decision now appealed from was based do not entirely support that decision. The Full Bench case of *Bilaso* v. *Dina Nath* (1), has no bearing on the present question. Mayne (Hindu Law and Usage, § 622) pronounces against the view taken in the judgment now under appeal, and points to a very anomalous result which follows from the adoption of that view *(op. cit.* ed. 6, p. 816). Dr. G. D. Banerjee (Tagore Law Lectures, 1878) no doubt follows the Mitakshara literally on pages 305 and 310 *(op. cit.*, ed. 2), but on p. 331 he expresses the opinion that the widowed mother does not take an absolute estate. See also *op. cit.*, pp. 278-279. In considering the definition of *stridhan* in the Mitakshara (II, 11, 2) we have to remember that Vijnaneshvara expressly uses that term in a non-technical sense (sec. II, 11, 3; Viramitrodaya, V, 1, 2; Sir W. Macnaghten, Hindu Law, Vol. I, p. 38; G. D. Banerjee, *op. cit.*, pp. 277-278; K. K. Bhattacharya, Joint Hindu Family, p. 617; Mayne, *op. cit.*, p. 799). As Dr. Jolly points out, Vijnaneshvara was an innovator and started a new theory (Tagore Law Lectures, 1883, pp. 242—247). But the British Courts have not adopted the etymological theory of Vijnaneshvara. The Privy Council have qualified his definition and excepted 'inherited property' from the category of *stridhan*. See *Mussumat Thakur Deyhee* v. *Rai Baluk Ram* (2), *Bhugwandeen Doobey* v. *Myna Baee* (3), *Chotey Lal* v. *Chunno Lall* (4). [*Cf.* on this last case Dr. G. D. Banerjee's comments, *op. cit.*, pp. 300-302.] At p. 510 of the judgment in *Bhugwandeen* v. *Myna Baee*, the Judicial Committee recognise the distinction drawn by Sir W. Macnaghten between *peculium* and non-technical *stridhan*. Therefore the authority of the Mitakshara alone is not sufficient.

Is there then any other reason why the share taken by a mother on partition should be deemed her *stridhan?* Observe first that the word *sambibhâga* used by Vijnaneshvara in the Mitakshara (II, 11, 2), though translated as 'partition' by Colebrooke, does not really include the mother's share on partition. He is citing there a text of Gautama which specifies

(1) (1880) I. L. R., 3 All., 88.
(2) (1866) 11 Moo., I. A., 139.
(3) (1867) 11 Moo., I. A., 487.
(4) (1878) L. R., 6 I. A., 15.

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the several means of acquisition of property. See Mitakshara (I., 1, 8 and 12). *Sambibhâga* is Gautama's word and is explained by Vijnaneshvara to mean 'obstructed heritage' (I., 1, 13). There is no reason to suppose that Vijnaneshvara used the same word in a different sense in Chap. II., § 11. Besides, even if Vijnaneshvara really meant 'partition' (as Colebrooke supposed), the only partition he recognises is of heritage between co-owners [Mitakshara I., 1, 2 and 23)], and a widow is not a co owner with the sons.

Consider next by what right the widowed mother takes a share. Phear, J., suggests it is taken either (1) by right of inheritance or (2) in lieu of maintenance [*Mohabeer Pershad* v. *Ramyad Singh* (1)]. In the first case (this view is supported by Jagannath, Digest, bk. V., 87, com.), the principle of the Privy Council rulings applies, and the share is not *stridhan*. In the second case (in support of which view see *Sheo Dyal Tewaree* v. *Judoonath Tewaree* (2), *Lalljeet Singh* v. *Raj Coomar Singh* (3), *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry* (4), *Beni Parshad* v. *Puran Chand* (5), and T. N. Mitra's *Tagore Law Lectures*, 1879, p. 467), the grant can enure only for life, *Ganpat* v. *Ram Chandar* (6). See also Sir F. Macnaghten's Considerations on Hindu Law, p. 43; S. C. Sircar, Vyavastha Chandrika, Vol. II, p. 493.

The only passage in the Mitakshara really against me is to be found in I., 6, 2, but this does not carry us beyond II., 11, 2, because the same line of succession is laid down with respect to *stridhan* generally in II., 11, 12, and yet that fact did not prevent the Privy Council from holding that property inherited from males was not *stridhan*.

[BANERJI, J.—But then, with respect to such inherited property, a different rule of succession is laid down elsewhere.]

But that rule is really not inconsistent with this (see G. Sarkar, Hindu Law, p. 270). And then all that the text says is मातुर्दुहितरः शेषं; such property may be, and literally is, the 'mother's property,' but that is not enough to constitute it *stridhan*, as that term is understood in Anglo-Hindu Law. It is

(1) (1873) 20 W. R., 192.
(2) (1868) 9 W. R., 61.
(3) (1873) 20 W. R., 336.
(4) (1889) I. L. R., 16 Calc., 758.
(5) (1895) I. L. R., 23 Calc., 262.
(6) (1888) I. L. R., 11 All., 296.

contrary to all principle that, though when the husband dies leaving no sons and the widow *inherits* the whole of his estate, she takes only a limited interest, yet when he dies leaving sons who exclude the widow, if they choose to separate, she, *who is no heir*, should take an absolute estate in the portion allotted to her.

Reference was also made to Vyavahara Mayukha (Mandlik), pp. 93, 97, 224, Vivada Chintamani (Tagore), p. 263, Smriti Chandrika (Iyer), pp. 53 and 110, Parasara Madhavya (Burnell), p. 41, *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (1), and West and Bühler, Hindu Law, pp. 356, 391, 781.

[BANERJI, J., also referred to the definitions of *stridhan* contained in the Subodhini and the Madana Parijat.]

Babu *Jivan Chandra Mukerji* replied on behalf of the respondents :

Confusion has been caused by a consideration of the law prevalent in other schools, and also owing to the idea that *stridhan* must be at the absolute disposal of the owner or must devolve in a particular way. The law of the Bengal school is essentially different from that of the Benares school ; there can be no partition in Bengal in the father's life-time.

The mother takes a share as a co-parcener. Every lady who comes into a family is a co-owner with the male members of the joint family. See K. K. Bhattacharya, Tagore Law Lectures, 1885, p. 142 ; G. Sarkar, Hindu Law, p. 125 ; Mayne, § 477, p. 625. The "inchoate right" of a widow thus becomes perfected at the time of partition, *Bilaso* v. *Dina Nath* (2). By the same right an unmarried daughter also gets a share [Mitakshara (I., 7, 5, 9)]. Partition, according to Vijnaneshvara, is by pre-existent right [Mitakshara (I., 1, 17, 23)]. That the mother does not take her share in lieu of maintenance is expressly stated in the Mitakshara (II., 1, 32—3).

The mother's share is *stridhan*, because (1) it descends after her death to the daughter, Strange's Hindu Law, Vol. II., p. 382; (2) it is more in the nature of a gift, Morley's Digest, Vol. II., p. 217 ; and (3) in fixing its amount deduction has to be made for *stridhan* already given, the two kinds of property are lumped together, Mitakshara (I , 2, 8), (G. Sarkar, Hindu Law, p. 184).

(1) (1888) I. L. R., 15 Calc., 292. (2) (1880) I. L. R., 3 All., 88.

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Vijnaneshvara rejects any technical limitation of the meaning of *stridhan*. For the rule of interpretation, see Dr. J. N. Bhattacharji's *Commentaries* (ed. 2), p. 64. The *dictum* of the Privy Council is not to be extended beyond their actual decision; the Mitakshara, being the paramount authority in these provinces, should be followed. See *Muthappudayan* v. *Ammani Ammul* (1); *Salamma* v. *Lutchman Reddi* (2); *Bhagirthibai* v. *Kahnujirav* (3); *Debi Singh* v. *Sheo Shanker Lal* (4). The Mitakshara is to be interpreted, not overruled.

There is no distinction between a wife taking a share when her husband partitions and a mother taking a share when her sons partition. The crucial test for determining whether certain property is *stridhan* is—upon whom does that property devolve? Upon that point the Mitakshara (I., 6, 2) is conclusive. The question of alienability is immaterial for the purposes of my argument in the present case.

Dr. *S. C. Banerji* in reply:

The female members of a Hindu joint family are not co-owners with the males *Narayana* v. *Krishna* (5); they cannot enforce a partition, which every co-owner can (J. N. Bhattacharji, *Commentaries*, pp. 321 and 336; Mayne, Hindu Law, p. 625; *Shama Soonduree Dabia* v. *Jardine, Skinner & Co.* (6).

The dominion of an owner over her *stridhan*, as we now understand that term, is absolute, *Brij Indar Bahadur Singh* v. *Ranee Janki Koer* (7). The passage in the Mitakshara (II., 1, 32, 3), is to be read with reference to the context. Vijnaneshvara is discussing the widow's right to inherit. The amount to be allotted to the mother is not to be limited to an allowance that will be just sufficient to maintain her. But this passage by itself is not sufficient to negative the theory that she obtains the share really as a provision for maintenance. That has always been the view of this Court, see *Rajah Buldeo Singh* v. *Koonwer Mahabeer Singh* (8). West, J.'s, observation on p. 302, I. L. R., 11 Bom., is *obiter*.

(1) (1897) 8 Mad., L. J., 9.
(2) (1897) 8 Mad., L. J., 14.
(3) (1886) I. L. R., 11 Bom., 285.
(4) (1900) I. L. R., 22 All., 353.
(5) (1884) I. L. R., 8 Mad., 214.
(6) (1869) 12 W. R., 160.
(7) (1877) 1 C. L. R., 318.
(8) N.-W. P., H. C. Rep., 1866, p. 155; at p. 157.

The argument based on the fact that in determining the amount of the share *stridhan* previously given has to be taken into account, applies to the Bengal school as well, see G. Sarkar, Hindu Law, p. 267. In fixing the amount of maintenance, too, productive *stridhan* has to be taken into account, see Mayne, *op. cit.* p. 599.

AIKMAN, J.—One Ganga Ram died about 40 years ago, leaving three sons, namely, Gopal and Bhupal, sons by his first wife, and Chunni, son by his second wife Musammat Udni, who also survived him. Ganga Ram owned a 2½ biswa share in mauza Amba Madanpur. After his death a partition of the property took place, one-half being recorded in the names of the sons by his first wife and the other half being recorded as held in equal shares by Chunni and his mother Musammat Udni. Musammat Udni died in 1869. Her son Chunni is also dead, and the quarter share, of which she was recorded as in possession, is now held by the three sons of Chunni, who, with their mother Musammat Lado, are the defendants to this suit. The plaintiffs are the sons of Gopal and Bhupal. Their case is that Musammat Udni held the share which was recorded in her name by way of maintenance, and for her life-time only, and that on her death it should be divided amongst the grandsons of Ganga Ram *per stirpes*. They accordingly sue to recover possession of two-thirds of the share recorded in the name of Musammat Udni. The Court of first instance dismissed the suit, holding that the fathers of the plaintiffs had separated from their father Ganga Ram during his life-time, and that the defendants had acquired title by adverse possession. On appeal the learned Subordinate Judge differed from these findings, and coming to the conclusion that after the death of Ganga Ram a partition took place between his sons, under which the one-fourth share in question was assigned to Musammat Udni, held that she had only a life interest in the property, which, on her death, reverted to the heirs of Ganga Ram, and gave plaintiffs the decree they asked for. The defendants appealed to this Court. The main plea urged on their behalf was that the share which fell to Musammat Udni was her *stridhan*, and, as such, the plaintiffs, sons of her stepsons, had no right to a share in it. The appeal was heard by a Judge of

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this Court sitting singly, who sustained the defendants' plea, set aside the decree of the Subordinate Judge, and restored that of the Court of first instance. From that decision this appeal has been filed under the Letters Patent.

The whole argument has turned on the question whether, under the Hindu Law applicable to these Provinces, the share which fell to Musammat Udni in the partition which took place after Ganga Ram's death, became thereby her *stridhan*. It was admitted that if it was *stridhan* the plaintiffs were out of Court.

The question thus raised for our decision is one of considerable difficulty. We do not have for our guidance any decision of this Court, or of the Privy Council on the point. The case cited in the judgment of our brother Blair now under appeal, *i.e. Bilaso* v. *Dina Nath* (1), decides that a Hindu widow who is entitled to an equal share with sons upon partition can claim that share not only against the sons, but also as against an auction-purchaser who has acquired the rights and interests of one of the sons before the partition. But it throws no light whatever on the question whether the share obtained by the widow becomes her *stridhan*.

In the case *Bhagwandeen Doobey* v. *Myna Baee* (2) the question which we have to decide was left an open one by their Lordships of the Privy Council. At page 514 of the judgment they say :—"The case is wholly distinguishable from those in which a widow, having a right to an ascertained share upon a partition with co-parceners, who have an absolute interest in their shares, is put by them in possession. *In such a case, it may be a question whether her interest does not become absolute;* though in a case coming from Lower Bengal the contrary was decided by this Committee on an appeal from the Supreme Court of Calcutta."

For the respondents reliance is placed on the well-known passage in the Mitakshara (Chap. II, S. XI, § 2), where the author Vijnaneshvara includes amongst property which forms a woman's *stridhan*, "property which she may have acquired by inheritance, purchase, *partition*, seizure or finding." Their Lordships of the Privy Council have in the case of *Mussumat*

(1) (1880) I. L. R., 3 All., 88. (2) (1867) 11 Moo. I. A., 487.

Thakoor Deyhee v. *Rai Baluk Ram* (1), *Bhugwandeen Doobey* v. *Myna Baee* (2), *Chotay Lall* v. *Chunno Lal* (3), and *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (4), held, notwithstanding the fact that inheritance is mentioned by the author of the Mitakshara as one of the sources of a woman's separate property, that property which a woman inherits from a male is not in her hands *stridhan* transmissible to her own heirs. In the last of the cases cited above, their Lordships say, at p. 301 of their judgment:—"It is not necessary now to state in any detail how impossible it is, whether with regard to other commentators or to other passages in the Mitakshara itself, to construe this passage as conferring upon a women taking by inheritance from a male a *stridhan* estate transmissible to her own heirs."

For the appellants reliance is placed upon a passage in the judgment of Phear, J., in the case *Mohabeer Pershad* v. *Ramyad Singh* (5), where he says:—"After the consideration which I have been able to give to the authorities which were cited on both sides, I have arrived at the opinion that the widow is upon the division which has been directed to be made, entitled to her share, either by way of maintenance or as a portion of the inheritance." It is argued with much show of reason that if it is by way of maintenance that a widow gets a share upon partition, that share should go back to her husband's heirs upon her death; on the other hand, if she gets it by way of inheritance the share will not, on the rulings of the Privy Council just referred to, descend to her heirs.

The next case relied on by the appellants is *Lalljeet Singh* v. *Raj Coomar Singh* (6), where it was held that under the Mitakshara Law a father may during his life-time partition the joint family property, and that if he does so, he must allot a share to his wife for her maintenance in addition to the share which he takes himself. With reference to this case we would call attention to a passage in the Mitakshara, Chap. I, S. 6, §§ 1 and 2 which, in our opinion, has a material bearing on the question we have to decide in this case. Vijnaneshvara is there considering the question "How shall a share be allotted to a

(1) (1866) 11 Moo., I. A., 139.
(2) (1867) 11 Moo., I. A., 487.
(3) (1878) L. R., 6 I. A., 15.
(4) (1881) I. L. R., 3 Mad., 290.
(5) (1873) 20 W. R., 192; at p. 195.
(6) (1873) 20 W. R., 336.

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son born subsequently to a partition of the estate?" Such a son, he says, obtains, after the demise of his parents, both their portions. Then he adds these important words, "(he obtains) his mother's portion, however, *only if there be no daughter*, for it is declared that daughters share the residue of their mother's property after payment of her debts." Here we have the author of the Mitakshara applying the special rules governing the descent of *stridhan*, to the share which a woman gets on partition during her husband's lifetime, showing clearly that he considers a share so acquired to be her *stridhan*.

It is admitted that whilst a family subject to the law of the Mitakshara remains joint, a woman has no right to any share of the family estate; all that she can claim is maintenance. But when a partition takes place in such a family, a mother is entitled to a share equal to a son's share. In the case *Sheodyal Tewaree* v. *Judoo Nath Tewaree* (1), Mitter, J., remarked:—"There is no doubt that the share that is given to a Hindu mother at the time of partition is given to her for no other purpose than as a provision for her maintenance."

If it were for no other purpose, one might suppose that when a partition takes place a woman would get only a share large enough for her maintenance.

But the author of the Mitakshara emphatically pronounces this idea to be "wrong." *Vide* II, I, 32.

There is nothing in the texts to indicate that she gets the usufruct only of the share; she gets the share itself.

For the appellants, reference is also made to the case of *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry* (2).

In that case, at p. 765 of the judgment, their Lordships of the Privy Council say:—"When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of a provision for the maintenance for which the partitioned estate is already bound." This, it may be mentioned, was a case under the Dayabhaga law.

The case of *Beni Parshad* v. *Puran Chand* (3), also relied upon by the appellants, was a case under the Mitakshara law. At

(1) (1868) 9 W. R., 61. (2) (1889) I. L. R., 16 Calc., 758.
(3) (1895) I. L. R., 23 Calc., 262.

p. 279 of the judgment, the learned Judges (Prinsep and Ghose, JJ.), say:—"The mother was entitled to hold her one-fifth share in lieu of maintenance only, and had therefore no absolute power of disposal, though, no doubt, the Mitakshara describes such property (*i.e.* property acquired by partition) as woman's property." They refer to the cases already cited from the Weekly Reporter, to Mayne's Hindu Law, paras. 614 to 617, and Viramitrodaya (Golap Chunder Sarkar's translation), pp. 224, 245. In the argument before us, reference was also made to the law of the Hindu widow by Trailokyanath Mitra (Tagore Law Lectures, 1879).

At p. 467 of that work, it is stated that the share which a widow gets on partition, namely, a share equal to that of each of her sons, she obtains in lieu of her maintenance. The author goes on to explain the reason of the widow getting a share. He says:—"After partition she loses her accustomed position, she cannot attach herself to any one of the several families created by partition, and it is improper that she should be floating about between one family and another for the purpose of obtaining a precarious maintenance. This the ancient sages could not tolerate; and they accordingly ensured her maintenance, in case of a partition, by making her the recipient of a share, which, inalienable by her during her life-time, would on her death devolve on her surviving heirs." If the author uses the words "her surviving heirs" advisedly, this passage would tell against the case set up by the appellants.

The appellants have also in their favour the authority of Sir Francis Macnaghten. At p. 43 of his "Considerations on the Hindu Law as it is administered in Bengal" (1824), he says:—"I believe it may now be laid down as the law that mothers who take a share upon partition, take an estate *for life* only, and with respect to dominion over the property, stand upon the same footing with widows who succeed to their husband's rights." He admits, however, that a distinction may possibly be made in a case in which all the sons had *agreed* to divide, remarking that in that case the share which the mother gets might be said to be *in the nature of a gift*, because they would all have concurred in the act by which their mother became entitled to a share of the estate.

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The next authority referred to in the argument was Gooroodass Banerjee's Hindu Law of Marriage and Stridhana (Tagore Law Lecture, 1878), 2nd edn., 1896. At page 305 the author deals with the question whether the share, which a woman obtains on partition, becomes her *stridhan*. He says:—"The Mitakshara and the Mayukha answer this question clearly in the affirmative." He points out that Jagannatha gives conflicting answers, refers to the passage quoted above from Sir F. Macnaghten, and sets forth the views entertained by the Bengal, Mithila and Dravida school. In his summary at p. 310 he says:—"The share which a woman obtains on partition is her *stridhan* according to the Benares and Maharastra schools, but it does not rank as *stridhana* according to the law of Bengal." The law of Mithila and that of Dravida are not very clear on the point; but there is reason for thinking that they do not differ from the law of Bengal. At p. 330 he says:—"The Hindu Law is not very clear regarding the rights of a woman over the shares obtained by her on partition," and remarks that the more correct view appears to be that a woman can have no greater rights over it than over the property of her husband which devolves on her by inheritance.

Our learned colleague, whose decision is under appeal, refers to Mayne's Work on Hindu Law as supporting the view that he takes. We doubt whether this is the case, for at p. 816 of the last edition of his work, that learned author says:—"Upon analogy there can be no reason why a woman who takes part of a property on partition between her sons should have a larger interest than if she had taken the whole in the absence of her sons."

The Viromitrodaya which has been referred to by the Privy Council as properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares school, has nothing clearly bearing on the question at issue, but it backs up the author of the Mitakshara in the extended meaning he gives to the term *stridhan*, remarking that the term "sixfold" used by Manu in connexion with *stridhan* "is intended, not as a restriction of a greater number, but as a denial of a less," and also supports him in saying that the word

stridhan has been used by Manu in its ordinary significance as denoting property whereof a woman is the owner, and not in any technical sense (*vide* Chap. V., parts 1 and 2).

According to Sir W. Macnaghten (Principles of Hindu Law, 3rd edn., p. 37), the succession to *stridhan* "varies according to the condition of the woman and the means by which she became possessed of the property."

The Mitakshara, however, gives but one general rule for the descent of *stridhan*, the only exception being in the case of the *sulka* or present given on marriage—*vide* Chap. II, Sec. XI, 8 and 30.

The distinction drawn by Sir W. Macnaghten between what he calls woman's property and what he styles her *peculium*, has been shown by Messrs. West and Bühler (Hindu Law, p. 146 *et seq.*), Jolly (Hindu Law, p. 244 *et seq.*), and Banerjee (Hindu Law of Marriage and Stridhan, 2nd edn., p. 276) not to have been present to the mind of the author of the Mitakshara.

The last case relied upon by the appellants is *Ganpat Rao* v. *Ram Chandar* (1). In that case there were two brothers forming a joint Hindu family. One died, leaving a son Ram Chandar; the other died, leaving a widow Musammat Lachhmi Bai. No partition had taken place, and it is clear that Lachhmi Bai was only entitled to maintenance. A deed was executed, whereby Ram Chandar having received from Lachhmi Bai a sum of money as representing the value of his half share of a house, declared her to be in sole proprietary possession of the whole of the house. She executed a deed of gift in respect of the house in favour of her brother's sons, the validity of which was impugned after her death. This Court held that under the circumstances the widow had no more than a life estate. We are of opinion that this case has no bearing on the question we have to decide.

The case then stands thus. The question we have to decide is pronounced by the Privy Council to be an open one, and there is, so far as we can ascertain, no case law in these Provinces bearing upon the point at issue.

In the conflict which undoubtedly exists amongst Hindu authorities, we consider ourselves bound to follow the Mitakshara,

(1) (1888) I. L. R., 11 All., 296.

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the paramount authority in these Provinces. We are of opinion that according to the law as laid down in Chapter II, Section XI of that work, property acquired by a woman by partition is her *stridhan*, and follows the rule of descent laid down for such property. That rule of descent is applied by the author of the Mitakshara himself to the case of a share acquired by a woman by partition during her husband's life time—*vide* the passage cited above from Mitakshara (I., VI., 2), the importance of which seems to have been generally overlooked. We see no reason for thinking that Vijnaneshvara would have applied any different rule in the case of a share acquired by a woman by partition taking place after her husband's death.

For these reasons we arrive at the conclusion that the decision of our brother Blair was right, and we dismiss this appeal with costs.

BANERJI, J.—The question raised in this appeal, namely, whether the share, which a Hindu mother, governed by the Mitakshara Law, gets upon a partition between the sons, is her *stridhan*, which devolves on her death on her own heirs, and not on the heirs of her husband, is by no means free from difficulty. Whilst the author of the Mitakshara in Chapter II, S. XI, § 2 includes such property among what constitutes a woman's *stridhan*, there are other considerations from which it may be inferred that she gets such share as a provision for her maintenance, and that it cannot in any case rank higher than the interest which a widow acquires in her husband's estate by right of inheritance. There is, however, no express text in the Mitakshara, which declares that the share thus obtained by the mother is obtained by her for her maintenance. In this respect the Mitakshara differs from the Smriti Chandrika (see Chap. IV) which is followed in the Dravida country, where it conflicts with the Mitakshara. The latter, however, is the paramount authority in the Benares school, and its express texts must, in the absence of anything to the contrary, be followed in these Provinces. For the purpose of determining whether the author of the Mitakshara intended that property obtained by a woman upon partition between her sons should be deemed to be her *stridhan* in the sense of being her separate property, the best test is that

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Banerji, J.

which was applied by their Lordships of the Privy Council in respect of property inherited by a woman from a male in the well-known case of *Bhugwandeen Doobey* v. *Myna Baee* (1), and the other cases to which my learned colleague has referred. It is clear, and is indeed conceded, that the share which a mother obtains upon partition between her sons partakes of the same nature as that obtained by a wife under a partition made by the father in his lifetime. As regards the share last mentioned, the rule of descent according to the Mitakshara is the same as in the case of *stridhan*. In Chap. I, S. VI, § 2, it is laid down that a son born after partition "obtains after the demise of his parents both their portions: his mother's portion, however, only if there be no daughter; for it is declared that 'daughters share the residue of the mother's property after payment of her debts.'" The preference of the daughter to the son as the successor to the mother's share shows that whatever may have been the reason for the allotment of the share to the mother, Vijnaneshvara declared such share to be the separate property of the mother, and intended that it should devolve in the same way as separate property of any other description. Unlike the case of property obtained by a woman by inheritance to a male, there is in this respect no conflict between the different texts of the Mitakshara. The safest course, therefore, seems to be to follow the text of the Mitakshara, and adopt the view which has been held by Mr. Justice Gooroodass Banerjee in his work on the Hindu Law of Marriage and Stridhan. The question is, however, beset with difficulties, and I must say that, although I do not feel myself justified in coming to a different conclusion from that at which my brother Aikman has arrived, my mind is not free from doubt. I agree in dismissing the appeal with costs.

Appeal dismissed.

(1) (1867) 11 Moo., I. A., 487.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1901
July 17.

SRI PAL RAI AND OTHERS (DEFENDANTS) *v.* SURAJBALI AND ANOTHER (PLAINTIFFS) AND RAGHUNATH RAI AND ANOTHER (DEFENDANTS).*

Hindu Law—Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan.

The share which is taken by the mother in a joint Hindu family upon partition of the family property being her *stridhan*, she is capable of alienating it at her pleasure.

IN this case one Kanhaiya Rai died leaving three sons and a widow, the stepmother of the three sons. After his death a separation was effected between the sons and stepmother in virtue of which the stepmother received a one quarter share of the property of Kanhaiya Lal. The widow then made a gift of her share to Raghubir Rai, one of her stepsons. This gift was challenged by the sons of one of the other stepsons, who came into Court claiming one-third of the property.

The Court of first instance (Subordinate Judge of Gorakhpur) found that the stepmother had been in adverse possession of the property claimed for more than twelve years, and dismissed the suit upon that ground.

The plaintiffs appealed. The lower appellate Court (District Judge of Gorakhpur) found in their favour and decreed the claim.

The defendants appealed to the High Court, and in this appeal two issues were remitted to the lower appellate Court, *viz.*, whether the property in suit was given to Musammat Phuljhari (the stepmother) as her share upon a partition being effected with the sons of Kanhaiya Rai, and, if so, was it given to her on the express understanding that she was to hold it only in lieu of maintenance? The lower appellate Court found as to the first of these issues in the affirmative and as to the second in the negative.

The arguments in this case were heard immediately after the arguments in the preceding case—*Chhiddu* v. *Naubat*, *supra* p. 67.

Pandit *Sundar Lal* for the appellants, amongst additional authorities, referred to Stokes' Hindu Law Books, p. 394, H. H. Wilson's works, Vol. V, pp. 27 and 29, and K. K. Bhattacharya, Joint Hindu Family, pp. 617 and 627.

If a share is allotted to the mother only in lieu of maintenance, then how is it that no share is allotted to other people who are also legally entitled to maintenance, *e.g.* the grandmother?

The reason why shares on partition have been provided for the parents seems to be to discourage partition in their lifetime.

If the share obtained by a mother on partition is not to be deemed her *stridhan*, then the word 'partition' had better be struck out from the Mitakshara (II, 11, 2). Because if only partition between co-owners has been contemplated, the property is already vested in the co-owners, and nothing new is acquired by partition. If two ladies are co-owners, before they partition the property is already their *stridhan*.

Sambibhaga is the same as *bibhaga* and means partition. See Wilson's Sanskrit-English Dictionary, *s. v.* The Bengal Judges who have decided that the mother obtains a share in lieu of maintenance had the special provisions of the Dayabhaga in mind. All the commentators on the Mitakshara support Vijnaneshvara in the wide interpretation that he has placed upon the word *stridhan*.

Dr. *S. C. Banerji* replied on behalf of the Respondents:

Even conceding that the share obtained on partition is *stridhan* in the mother's hands, there is no authority for the proposition that she may alienate it at pleasure. If the Mitakshara is silent as to the right of absolute disposal (see *per* West, J., 8 Bom., H. C. R., O. C. J., at p. 265), the Viramitrodaya makes it quite clear that *stridhan* other than *saudayika* cannot be alienated, *vide* Sarkar's translation, pp. 223-4. But Dr. Jolly has shown that the Mitakshara is really an authority negativing the alleged power of alienation. Tagore Law Lectures, 1883, p. 252, G. D. Banerjee, Tagore Law Lectures, 1878, p. 331, J. N. Bhattacharjee, Commentaries on Hindu Law, p. 573, and Mayne, Hindu Law and Usage, pp. 796 and 816, are all authorities in my favour. West and Bühler (Hindu Law, p. 781) refer to a Bombay case in which it was ruled that the lady held only as a tenant for life.

As to the grandmother's right to a share the authorities are conflicting, see J. N. Bhattacharji, *op. cit.*, p. 340.

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Partition under the Mitakshara always takes place by virtue of a pre-existent right (I., 1, 23); it is only an adjustment of rights and not the source of a new right. We cannot put our own gloss where Vijnaneshvara has explicitly told us what he understands a particular word to mean. Besides, partition by two or more joint female heirs is expressly laid down by the commentators (G. Sarkar, Hindu Law, p. 271).

There is nothing peculiar in the provision regarding the allotment of a share to the mother on partition contained in the Layabhaga (III., 2, 29). In deciding a question like this the whole of the Hindu law regarding the rights and obligations of widows in a joint family should be considered, and not only the special words used in a particular text or *placitum*.

The following judgment was delivered :—

BANERJI and AIKMAN, JJ. :—In this appeal the same question arises which arose in Letters Patent Appeal No. 24 of 1900, which we have just decided, namely, whether the share which a mother gets at a partition between her sons is her *stridhan*. We have held in that case that such a share must be deemed to be a woman's *stridhan*. That being so, Musammat Phuljhari was competent to make the alienation which has been impeached in this case. It is conceded that the decree for possession which was made by the lower appellate court could not in any event be sustained. There is another reason why the suit must fail. Raghunath s a nearer reversioner than the plaintiffs, and as it has not been found that he is in collusion with the widow, the plaintiff's are not entitled to maintain the suit. On both these grounds the suit must fail. The result is that we allow the appeal, set aside the decree of the lower appellate court with costs, and restore that of the court of first instance. The appellants will get their costs of this appeal.

Appeal allowed.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

1901
July 29.

KISHAN PRASAD AND OTHERS (DECREE-HOLDERS) *v.* BENI RAM AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Decree payable by instalments—Tender—Payment by money-order where creditor had to send to the Post Office for the money—Implied authority to pay in a certain manner.

A judgment-debtor under an instalment decree remitted the amount payable on account of one instalment to one of the decree-holders by money-order. The decree-holder payee was at the time living in a village where he would have had to go himself or send some one to take the money from the Post Office; but, on the other hand, two previous instalments had been paid in a similar manner without objection on the part of the decree-holder. On this occasion the decree-holder payee temporized, so that the money was not at once returned by the Post Office to the sender, and subsequently applied for execution of the whole decree on the ground that there had been no valid payment of this instalment.

Held that the decree-holder by not refusing the money-order at once had prevented the judgment-debtor from having an opportunity to pay the instalment within time: he had not acted in good faith, and ought not to be allowed to take advantage of his action, even if the previous acceptance of payments made in the same manner did not amount to an implied authority to the judgment-debtor to pay by money-order. *Polglass* v. *Oliver* (1), referred to.

The appellants in this appeal were the assignees of a decree for money, which under a compromise between them and the judgment-debtors had come to be a decree payable by instalments. The compromise provided that Rs. 75 were to be paid on the puranmashi (30th) of each Sawan, and in case of default the decree-holders were at liberty to execute their decree for the whole balance remaining due. The decree-holders on the 2nd of September, 1898, applied for execution of the whole decretal amount then remaining due, alleging that the judgment-debtors having paid three instalments under the compromise had failed to pay the next instalment which had fallen due on the last day of Sawan, 1305 Fasli (the 2nd August, 1898). The judgment-debtors had in fact despatched a money-order to the address of Jamna Prasad, one of the decree-holders, who resided at a place in which, under the rules in force, the Post Office does not pay the amount of a money-order to the payee at his house, but sends notice of the arrival of the money-order to the payee,

* Second Appeal No. 412 of 1900 from an order of Rai Anant Ram, Additional Subordinate Judge of Ghazipur, dated the 7th February, 1900, reversing an order of Babu Bansgopal, Munsif of Ballia, dated the 30th September, 1899.

(1) (1831) 37 R. R. 623.

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requesting him to attend personally at the Post Office, or send a duly authorized agent to receive payment of the amount. On July 26th a notice of this kind was sent to Jamna Prasad, who first of all said that he wished the money sent to his house, but afterwards told the Postmaster that he would "take the money after inquiry." He never did take the money, and it was ultimately returned to the respondents, but meanwhile the time within which the instalment had to be paid had lapsed.

The Court of first instance (Munsif of Ballia) held that this tender was insufficient and disallowing the judgment-debtors' objections ordered execution to proceed.

The judgment-debtors appealed; and the lower appellate Court (Additional Subordinate Judge of Ghazipur) found that the amount of the instalment in question was sent in time and that the decree-holders improperly refused to take it. He accordingly set aside the Munsif's order.

The decree-holders appealed to the High Court.

Mr. *W. Wallach* (who appeared, holding the brief of the Hon'ble Mr. *Conlan*, with Mr. *Abdul Majid*, for the appellants), while admitting that a valid tender made to one of the three joint decree-holders would be a sufficient compliance with the terms of the decree, contended that on the facts found the respondents had made no valid tender to Jamna Prasad. He also contended that even if a valid tender had been made, the Court executing the decree was bound by the last clause of section 258 of the Code of Civil Procedure to disregard it, because it had not been certified to the Court as required by that section.

Mr. *S. Amir-ud-din* for the respondents. The finding of the appellate Court on the question raised by the appellants is that "the amount of the instalment in question was sent in time to the decree-holders, but they improperly refused to take it." That is a finding conclusive between the parties to the appeal, the soundness of which cannot be questioned in second appeal. There was, moreover, no default on the part of the respondent in paying the instalment for 1305 Fasli. That instalment was remitted to the decree-holders ten days before it was payable. The amount of the money-order was tendered to Jamna Prasad, one of the decree-holders, by the Postmaster, but h eferused to accept the tender.

Jamna Prasad's refusal is fatal to the claim now made by the decree-holders. The decree-holders were not entitled to raise any question as to the validity of the tender made to Jamna Prasad. Two previous instalments that had been remitted in the same manner were accepted by the decree-holders, and they are now estopped from arguing that they were not legally bound to accept the present payment tendered in a similar manner through the medium of Jamna Prasad. Section 258 of the Code of Civil Procedure does not apply to the present case, and even if it does, the information subsequently given to the Court by the judgment-debtors is a sufficient compliance with the requirements of that section.

The following judgment was delivered :—

BURKITT and CHAMIER, JJ.—The appellant obtained against the respondents a decree for the payment of money by instalments, one of the terms of which was that the respondents were to pay Rs. 75 on or before the last day of Sawan in each year, and in case of default, execution might be taken out for the whole amount of the decree. The respondents paid the instalments by due date in 1303 and 1304F., and there is no dispute as to them. The question which we have to decide in this appeal concerns the instalment which was payable on or before the last day of Sawan 1305F. (August 2nd, 1898). On July 23rd, 1898, the respondents despatched a money-order for Rs. 75 to the address of Jamna Prasad, one of the appellants, who resided in a locality in which, under the rules in force, the Post Office does not pay the amount of a money-order to the payee at his house, but sends notice of the arrival of the money-order, requesting him to attend personally at the Post Office, or send a duly authorized agent to receive payment of the amount. On July 26th, a notice of this kind was sent to Jamna Prasad, who first of all said that he wished the money sent to his house, but afterwards told the Post-master that he would "take the money after inquiry." He never did take the money, and it was ultimately returned to the respondents but meanwhile the time within which the instalments had to be paid elapsed.

On August 29th, the appellants applied for execution of the decree in respect of the whole sum decreed, alleging that the respondents had failed to pa the instalment for 1035F.

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The Munsif ordered execution to issue as prayed, but on appeal the Subordinate Judge held that the instalment for 1305F. had been sent to the appellants in time, and that they had improperly refused to accept it.

The decree-holders have appealed to this Court. Their learned counsel, Mr. *Wallach*, admitted that a valid tender made to one of the three joint decree-holders would be sufficient compliance with the terms of the decree; but he contended that, on the facts found by the lower appellate Court, the respondents had made no valid tender to Jamna Prasad. He also contended that even if a valid tender had been made, the Court executing the decree was bound by the last clause of section 258, Civil Procedure Code, to disregard the tender, because it had not been certified to the Court as required by that section.

Ordinarily, no doubt, a tender of money in payment must be made with an actual production of the amount in cash (or in notes, where notes are legal tender), and if a debtor sends a cheque or bill without any authority or request by the creditor that the amount should be remitted in that manner, the creditor is not bound to accept it in payment. Tender of the amount due at the house of the creditor by a Post Office peon holding a money-order sent by a debtor would undoubtedly be a good tender by the debtor. In the present case, the creditor would have had to go to the Post Office for the money, and on this account it is said that there was no valid tender. Now it is admitted on the pleadings that the instalments for 1303 and 1304 F. were remitted by money-order, and were accepted without objection by the decree-holders. If, when the arrival of the money-order was notified to Jamna Prasad, he had said that he would not accept the money-order, it would, under the rules in force, have been returned at once by the Post Office to the sender, who might then have had time to pay the money into Court, or to the appellants in cash at their door; but by saying that he would take the money after inquiry, he induced the Post Office to refrain from returning the money to the sender, or notifying to him that the money had been refused.

We are inclined to think that the receipt by the appellants of the instalments for 1303 and 1304F. by money-order without

objection was sufficient authority to the respondents to send subsequent instalments in the same manner; but apart from that it is clear that Jamna Prasad, by his action in delaying the return of the money to the respondents, deliberately deceived them. In the case of *Polglass* v. *Oliver* (1), a tender was made in country bank notes, which the creditor was not bound to accept. He made no objection on that account, but claimed a larger sum. It was held that he could not subsequently object to the character of the tender, because if he had objected at once on that ground, it would have given the debtor an opportunity of getting other money and making a valid tender, but by not doing so and claiming a larger sum he had deluded the debtor. There are other decisions to the same effect. The principle on which those cases were decided applies to the present case. Here the appellant, Jamna Prasad, obviously acted in bad faith. If he wished to object to the character of the tender, he should have done so definitely and at once. He was admittedly acting for all the appellants. Jamna Prasad's action must be held to amount to waiver of the objection which he might have made to the character of the tender, and the appellants are estopped from now setting up any objection to the tender on that ground.

We cannot accede to the contention that the Court was bound to disregard the tender because it had not been certified to the Court. Neither the second nor the third clause of section 258 of the Code of Civil Procedure in terms applies to such a case as this, for no actual payment of money was made which could be certified to the Court; but as tender is, for some purposes, equivalent to payment, it may have been the duty of the respondents to inform the Court of the tender. Assuming that section 258 applies to such a case as this, we consider that the requirements of the section were sufficiently complied with by the respondents. They had 90 days within which to inform the Court of the tender having been made. They filed a petition well within that time in answer to the appellant's application for execution. In it they stated what had taken place, and asked that the application for execution might be rejected. It is true that they did not ask for the issue of a notice to the appellants,

(1) (1831) 37 R. R., 623.

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as required by the section, but, in fact, notice was served upon the appellants' pleader. If, along with their petition of objections, the respondents had filed a separate application, expressly referring to section 258, it would obviously have been the duty of the Court to decide, first, whether a valid tender had been made. A finding in the affirmative would have been equivalent for the purposes of this case to recording a payment as certified. The Court would then have taken up the application for execution, and would have been bound to reject it in pursuance of its finding that a valid tender, equivalent to payment, had been made. In the present case there was only one proceeding, but this can make no difference. In our opinion there is nothing in section 258 which prevented the Court from trying the question whether a valid tender was made, or from giving effect to its finding that a valid tender was made. We dismiss this appeal with costs.

Appeal dismissed.

1901
August 3.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

HAJI KHAN (DEFENDANT) v. BALDEO DAS (PLAINTIFF).*

Practice—Pleadings—Failure of plaintiff to establish case set up by him—Right to succeed upon facts found differing from those alleged.

The plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff, that the tenancy had commenced some elven years before suit, and that for the last three years the defendant had ceased to pay rent, and had recently denied the plaintiff's title.

The defendant denied that the plaintiff was the owner of the house or that he had leased it to the defendant. He pleaded also that he had been in adverse possession for more than twelve years.

The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that the plaintiff had been in possession within a period of twelve years from the institution of the suit.

Held that, under the circumstances stated above, it being, on the failure of the plaintiff's case as to tenancy, for the plaintiff to prove that he had possession within twelve years, the plaintiff was not entitled to a decree.

Naiku Khan v. *Gayani Kuar* (1), *Ali Husain* v. *Ali Bakhsh* (2) and *Balmakund* v. *Dalu* (3) referred to.

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* Second Appeal No. 581 of 1900 from a decree of Maulvi Maula Bakhsh, Additional Subordinate Judge of Aligarh, dated the 21st May, 1900, confirming a decree of Babu Parmatha Nath Banerji, Munsif of Koel, dated the 19th March 1900.

(1) (1893) I. L. R., 15 All., 186. (2) Weekly Notes, 1889, p. 176.
(3) Weekly Notes, 1901, p. 157.

The plaintiff in this case came into Court alleging that he was the owner of a certain house; that ten or eleven years before suit he had leased the house in question to the defendant at a monthly rent; that for three years before suit the defendant had paid no rent, and a few months before suit he had denied the title of the plaintiff.

The defendant in his written statement denied that the plaintiff was the owner of the house or that he had leased it to the defendant. He pleaded that he had been in adverse possession for more than twelve years, and that the suit was barred by limitation.

The Court of first instance (Munsif of Aligarh) found that the lease set up by the plaintiff was not proved, but that the house belonged to the plaintiff and that the defendant was in possession of it with the plaintiff's consent and that his possession was within twelve years from the date of suit. That Court gave the plaintiff a decree for possession, disallowing his claim for rent.

On appeal by the defendant the lower appellate Court (Additional Subordinate Judge of Aligarh) coming to similar conclusions of fact upheld the decree of the Court of first instance.

The defendant appealed to the High Court.

Maulvi *Ghulam Mujtaba* for the appellant. The plaintiff having failed to prove the specific title upon which he based his claim cannot be allowed to succeed upon a different title. The plaintiff failed to prove that the relationship of landlord and tenant ever existed between himself and the defendant, and the lower Courts were wrong in giving him a decree simply because the defendant was unable to substantiate his plea of adverse possession. I rely on *Naiku Khan* v. *Gayani Kuar* (1).

Mr. *Kashi Prasad* (holding the brief of Mr. *S. S. Singh*) for the respondent relied on the decision of Tyrrell, J., in *Ali Husain* v. *Ali Bakhsh* (2), and contended that the plaintiff having been found to be the owner of the house of which the defendant was in occupation, and that defendant being found to have no title either as lessee or licensee or by virtue of adverse possession for more than twelve years, the Court below was right in giving him a decree for possession.

(1) (1893) I. L. R., 15 All., 186. (2) Weekly Notes, 1889, p. 176.

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Judgment was as follows:—

BURKITT, J.—In this case the plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff; that the tenancy had commenced some eleven years before; that for the last three years the defendant had ceased to pay rent, and had denied the plaintiff's title. Both the Courts have found that the allegations as to the tenancy are untrue, and have found that the relationship of landlord and tenant has not been shown to have existed between the plaintiff and the defendant. They have therefore dismissed the suit, so far as it was founded on the allegation of tenancy, but have given the plaintiff a decree for possession as owner. Now it seems to me that this decree cannot be supported on the allegations of the plaint. The only way the plaintiff stated himself to be in possession of the property in suit was by alleging that the defendant was his tenant. Had the tenancy been proved, it would have followed that the plaintiff was in possession through his tenant. But it has been found that the defendant was not his tenant. The position therefore is this, that the plaintiff has failed to prove possession over the disputed premises within twelve years before suit. It is alleged, of course, that he was in possession before the commencement of the alleged lease to defendant; of such possession there is not a scrap of evidence, and I am of opinion that in a case like this, where plaintiff's principal allegation has been proved to be untrue, we should not send down an issue to the Lower Court to enable him to establish a subsidiary line of attack. I would therefore allow this appeal, setting aside the decrees of the Lower Court, and dismiss his suit with costs.

CHAMIER, J.—The plaintiff's case was, that he was the owner of the house in suit; that ten or eleven years before the suit he had leased it to the defendant at a monthly rent; that for three years before suit the defendant had paid no rent, and that a few months before the suit he had denied the title of the plaintiff.

The defendant in his written statement denied that the plaintiff was the owner of the house, or that he had leased it to the defendant. He pleaded that he had been in adverse possession

of the house for more than twelve years, and that the suit was barred by limitation. Both the Courts below have disbelieved the evidence as to the alleged lease, but they have passed a decree in favour of the plaintiff for possession on the ground, apparently, that the defendant has not proved twelve years' adverse possession. Mr. *Ghulam Mujtaba*, on behalf of the defendant, relying upon the decision of this Court in *Naiku Khan* v. *Gayani Kuar* (1) contends that as the plaintiff failed to prove the case stated in his plaint, the suit should have been dismissed. On the other hand, counsel for the plaintiff has referred us to the judgment of Tyrrell, J., in *Ali Husain* v. *Ali Bakhsh* (2) and to the judgment of Aikman, J., in an unreported case—S. A. No. 631 of 1899, *Balmakund* v. *Dalu*, decided on July 10th last (3).

I am most unwilling to bind a plaintiff too closely to his plaint in a case of this kind, and I agree with the opinion expressed by Aikman, J., that a suit like the one before us should not be dismissed merely because the plaintiff fails to prove that he leased the premises to the defendant, and that if a Court sees that the plaintiff is entitled to the relief which he claims, although on grounds other than those put forward in his plaint, the Court should give that relief, if the defendant would not thereby be taken by surprise.

In the present case, however, if the plaintiff's allegation about the lease be eliminated, the suit must be regarded as one for the possession of immovable property of which the plaintiff has discontinued possession. He alleges that he discontinued possession less than twelve years before the suit, but this is denied by the defendant. It was for the plaintiff to prove that he had been in possession within twelve years before suit. Counsel for the plaintiff does not suggest that, apart from the evidence which has been disbelieved by both the Courts below, there is any evidence on the record that the plaintiff was in possession within twelve years before suit. Looking at the record of the first Court I find that he sought, by means of the evidence as to the grant of a lease, both to prove his possession within limitation

(1) (1893) I. L. R., 15 All., 183. (2) Weekly Notes, 1889, p. 176.
(3) Since reported, Weekly Notes, 1901, p. 157.

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and to prevent the defendant from disputing his title. It is contrary to the practice of this Court to remand a case in order to give a plaintiff a second opportunity of proving his case, except for special reasons, and I see no reason why such a course should be adopted in this case. This is not a case in which the Court can see that the plaintiff is entitled to the relief which he claims on a ground other than that stated in his plaint. Nor is it a case in which any evidence tendered by the plaintiff has been wrongly excluded. There is no ground whatever for the admission of fresh evidence. On the evidence now on record the plaintiff's case fails, and should have been dismissed. I therefore concur in the order proposed by my learned colleague, namely, that this appeal should be accepted and the suit dismissed with costs.

BY THE COURT.—The appeal is allowed, and the decrees of the Lower Courts are set aside with costs.

Appeal decreed.

PRIVY COUNCIL.

P. C. 1901 *June* 21. *November* 8 *and* 30.

BAHADUR SINGH AND OTHERS (PLAINTIFFS) *v.* MOHAR SINGH AND OTHERS (DEFENDANTS).

[Appeal from the High Court, North-Western Provinces, Allahabad.]

Title—Evidence and proof of Title—Effect of arrangement made by Settlement Officer between the widow in possession and the ancestors of the plaintiff—Recognition of relationship and heirship—Act No. I of 1872 *(Indian Evidence Act), section* 32, *clauses* (5) *and* (6)*—Evidence of pedigree—Statements* post litem*—Estoppel.*

The plaintiffs claimed certain lands on the death in 1892 of the widow of the last male owner as his collateral heirs. The last owner was, they alleged, descended in the same degree from a common ancestor as the persons of whom the plaintiffs were themselves descendants in the direct line. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in possession of the lands in dispute). On that occasion (it being uncertain whether she had an absolute or only a life estate in the property, though she claimed to be the absolute owner) she was asked by the Settlement Officer who would be her heirs on her death. Her reply was:—"If the claimants undertake to pay the

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON AND LORD LINDLEY.

debt which is due by me on account of revenue, or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death; but so long as I am alive I have every sort of power in respect of my estate"; and the estate was settled with her, the claimants accepting her conditions. In the record-of-rights showing the shares in the estate as prepared under Regulation IX of 1833 at the time of settlement the widow stated:—"As to the appointment of lambardar the claimants who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me, and one of them whom the Collector will think fit will be appointed lambardar." At a further settlement made in 1866 the widow stated:—"I have no heir to succeed me after my death, therefore I cannot propose anything in regard to the office of lambardar."

Held by the Judicial Committee that the statements made in 1847 amounted to an admission by the widow of relationship and recognition of the plaintiffs' ancestors as her successors, a recognition on her part both that her husband's heirs were entitled to succeed her, and also that she was not prepared to contest their claim to be such heirs. The statements were unintelligible on any other footing, and unless the claimants were the heirs they had no interest in the proceedings. Neither their acceptance of her conditions, nor her subsequent statement that she had no heirs, detracted from this effect of the proceedings of 1847; the latter statement was strictly accurate if (as their Lordships found was the fact) she had only a Hindu widow's estate in the property.

The principal oral evidence consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such of these statements as were made since 1847 were inadmissible in evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) as being *post litem*. The Judicial Committee held that they were admissible, the heirship of the then claimants not being really in dispute at that time.

The widow had in 1862 made an alienation of the property to the defendants and it was objected to the plaintiffs' claim that they were estopped by what took place in 1847 from disputing her power of alienation as absolute owner of the property.

Held by the Judicial Committee that there was no evidence of any representation on which to found an estoppel; and even assuming that the arrangement made by the Settlement Officer amounted to a contract between the then claimants and the widow, such contract was not binding on the plaintiffs. The then claimants were only expectant heirs with a *spes successionis*. The plaintiffs claimed in their own right as heirs of the last male owner when the succession opened, and it could not be held that a person so claiming was bound by a contract made by every person through whom he traced his descent.

On the whole case the Judicial Committee held (reversing the decision of the High Court) that the plaintiffs had made out the title they set up.

APPEAL from a decree (23rd December 1898) of the High Court at Allahabad, reversing a decree (31st January, 1896) of

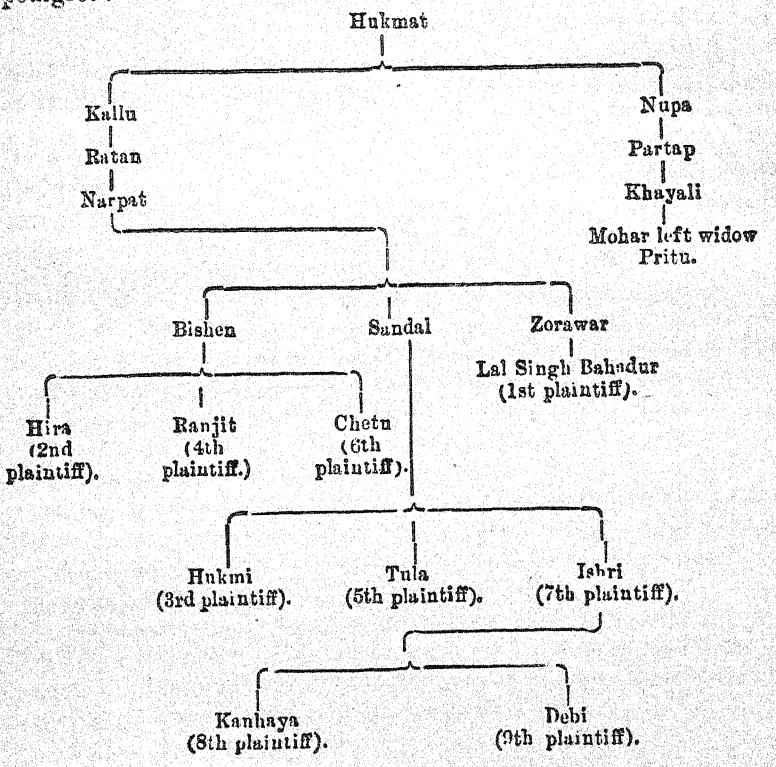
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the Subordinate Judge of Dehra Dun and dismissing the appellants' suit with costs.

In their suit, the appellants, claiming as heirs in the male line of one Mohar Singh, sought to recover on the death of his widow, Pritu, certain jungle lands called mahal Guljawari, which were in possession of the defendants under a grant from her.

Mohar Singh died at some date considerably before 1847. He left a widow, Pritu, but no issue. The plaintiffs claimed to be the collateral heirs of Mohar Singh, as shown in the following pedigree:—



The plaintiffs alleged that on the death of Mohar Pritu acquired the rights of a Hindu widow in his estate, and that Guljawari then passed to her with his other property. On the 29th of November 1862 Pritu granted to the predecessors of the defendants for Rs. 1,000 a lease of three jungles, of which Guljawari was one with the right of cutting wood. On the 15th of February 1867 she sold the same jungles to one Major Delane, subject to the rights

of the lessees. He obtained mutation of names with the same reservation. Litigation ensued between Major Delane and the lessees, which was terminated by the sale by Delane of his rights to the lessees on the 23rd of May 1868. The defendants remained in possession until after the death of Pritu, which took place on the 3rd of March 1892.

The plaintiffs alleged that the defendants' lease expired on the 29th of November 1892; that they then stopped the defendants from cutting wood, on which, in proceedings under the Specific Relief Act, the defendants obtained an order for possession under section 9 of that Act, and possession was given to them.

The defendants in their written statement denied the plaintiffs' right to sue. They alleged that Pritu had been turned out for misconduct, and had lost her right to inherit; that on the death of Mohar his aunt Nando took possession of the property; that on her death Pritu took forcible possession and became full owner by settlement proceedings in 1848. The transactions of the adverse claimants at the time of those proceedings were pleaded as constituting an estoppel to the present plaintiffs.

The defendants further asserted that the lease was valid by custom in Dehra Dun, and as a matter of necessity within the legal powers of Pritu if she had only a widow's estate; that they were now holding either under a valid sale from Major Delane, or had obtained a good title by limitation; and they pleaded that they were purchasers for value in good faith, and if turned out were entitled to compensation.

These settlement proceedings which formed the documentary evidence in the case took place in 1847-48 and in 1866. The first zamindari settlement in Dehra Dun was made in 1847, and of the property now in dispute amongst other estates. On the 16th of February, 1847, Zorawar presented a petition to the Settlement Officer, Mr. Ross, in which he claimed that the settlement ought not to be made with Pritu, on the ground that Narpat, his father, and Khayali, the father of Mohar, were own brothers. A petition to the same effect was put in by Bishan on the 14th of May, 1848, in which he represented that Pritu had been turned out of her home for misconduct. In the same year depositions were given by

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Bishan and Zorawar in which they alleged that the zamindari of Dain Adhoiwala (which included the village of Guljawari now sued for) had been purchased jointly by their grandfather Ratan, and Mohar's grandfather who appears to have been known by the name of Chaini. A genealogical table showing the descent of both parties from a common ancestor was filed by Bishan. On the other hand Pritu's mukhtar gave a deposition in which he alleged that the property was purchased by Chaini alone, and that Mohar and Zorawar were only related as members of the same brotherhood. The result of the inquiry then made is shown in the following record of the proceedings of the Settlement Officer of the 9th of October 1848:—

"To-day, at the time of the settlement of Dain in dispute, this case was brought forward along with the office report and that of the Tahsildar of Mahal in the presence of the parties. After perusing the papers on the record and hearing the statement of the parties it appears that both the parties, *i.e.*, the (husband of the) person now in possession and the claimants are the descendants of a common ancestor, and the person now in possession is a widow having no heir or child. Although the claimants are the descendants of a common ancestor, yet they were never in possession of the share in dispute, a fact admitted by the claimants themselves. Having regard to the fact that the claimants have been out of possession from of old, their claim for possession and right to settlement was disallowed and the person now in possession, who was present with Natthu, her general-attorney, was asked to state who would be the owner of her estate after her death. She replied:—"If Zorawar, Bishan and Sandal, the claimants, who are own brothers, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be the owners of my estate after my death. But so long as I am alive, I have every sort of power in respect of my estate." As the statement of the person now in possession seemed just and proper, the claimants were directed that if they had a claim to the estate, they should act according to the conditions now stated by the person now in possession before the Court, and that thus they could be the owners of her estate after her death; that during her lifetime she was to remain the owner of her estate in every respect and that they could not in any way interfere with her estate without her consent. Accordingly, the claimants agreed to act according to the conditions alleged by the person now in possession, and requested that their names might be entered in the settlement wajib-ul-arz (village administration paper) so that no dispute should arise in future. It is therefore

ORDERED:

"That for the reasons given above the claimants' claim to have the settlement made with them as zamindars during the lifetime of the person now in possession be considered disallowed, and according to the statement of the

person now in possession a mention of the fact that after her death, the claimants, with Sandal their third brother, would, if they fulfilled all the conditions alleged by her, be entitled to her estate be made in the wajib-ul-arz (village administration paper)."

The administration paper was as follows:—

"RECORD-OF-RIGHTS showing the shares in Dain Adhoiwala, pargana Sanaur, district Dehra Dun, as prepared under Regulation IX of 1833, at the time of settlement in 1848"

"As to the appointment of a lambardar. After my death, Zorawar, Sandal and Bishan, who are own brothers, will become the owners of this estate in equal shares, provided that they pay the present and future debts and remain obedient to me, and one (of them) whom the Collector will think fit for lambardarship will be appointed lambardar."

At the settlement proceedings in 1866, the settlement of the zamindari with Pritu was confirmed. On that occasion she stated:—

"I have no heir to succeed me after my death: therefore I cannot propose anything in regard to the office of lambardar."

The oral evidence so far as it is material is sufficiently stated in their lordship's judgment. The principal witnesses Hira and Bahadur stated that they are in possession of the rest of the property held by Pritu.

The issues settled were (1), are the plaintiffs entitled to sue? (2) what was the position of Pritu with respect to the property in dispute, *i.e.* had she possession with the interest of a Hindu widow merely or was she in possession as absolute owner? (3) Did Pritu convey the property to Major Delane? (4) If so, and her position be found to be that of a Hindu widow, was the transfer justified on the ground of necessity, and is it binding on the plaintiffs?

On the 31st of January, 1896, the Subordinate Judge gave a decree in favour of the plaintiffs. On the first issue he found that they had made out their title satisfactorily, relying chiefly for this finding on the transaction of 1848, which was proved by documents filed by the defendants. On the second issue, after rejecting the suggestion of Pritu's misconduct and expulsion, of which there was no evidence, he said:—"It appears to me indisputable that Pritu got possession of Mohar Singh's property as his widow. Nando appears to have looked after the estate, Pritu being then very young. On the death of Nando, Pritu assumed the

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management herself." Further, he held that the plaintiffs were not estopped by anything done by their ancestors in 1848 from denying that she was then an absolute owner, and that Government in settling with her as zamindar was not granting new rights, but was merely restoring certain rights which had been for some time in abeyance. On the third issue he found that Pritu had sold the jungles in dispute to Major Delane who had conveyed them to the defendants; but on the fourth issue he held that her alienation was not justified by any proved custom, nor under the pressure of any such necessity as to constitute a valid alienation by a Hindu widow.

From this decision the defendants appealed to the High Court at Allahabad, a Division Court of which (KNOX and BANERJI, JJ.) on the 23rd of December, 1898, reversed the decree of the Subordinate Judge on the ground that the plaintiffs had not made out their title, which they were bound to do. The oral evidence they treated as quite insufficient. As to the documentary evidence they said:—

"As regards the documentary evidence, we may observe that it is not consistent with the genealogy now set up by the plaintiffs. It appears that in 1847 and 1848, upon the death of Musammat Nando, the paternal aunt of Mohar Singh, Bishan, Zorawar and Sandal, the ancestors of the present plaintiffs, claimed the estate in the court of the Settlement Officer. Zorawar stated in his petition, dated 16th February, 1847, that his father Narpat and Khyali, the father of Mohar, were own brothers. In his deposition he said that his grandfather Ratan and Chaini, the grandfather of Mohar Singh, were cousins. Bishan stated in his deposition, dated 14th August, 1848, that Chaini, the ancestor of Mohar, and Ratan were 'own brothers'. There is no mention of Chaini in the pedigree now set up, and no pedigree appears to have been produced in the proceedings in which the above statements were made. The relationship then claimed was repudiated on behalf of Musammat Pritu, who said that Zorawar and Mohar were only members of the same brotherhood. The Settlement Officer was no doubt of opinion that Pritu's husband and the claimants were descended from the same common ancestor, but he did not decide what the relationship was. It appears that Pritu stated that Zorawar, Bishan and Sandal would be the owners of her estate after her death, provided they paid her debts, present and future, and gave her satisfaction. This statement is regarded by the Court below as an admission of relationship and recognition by Pritu of the plaintiffs' ancestors as her heirs and successors. We are unable to take the same view of the statement of Pritu as the learned Subordinate Judge. It seems to us that in order to avoid further disputes, Pritu consented to those persons taking her estate after her on the condition

that they should pay her debts and remain obedient to her. If they were her heirs and were recognised by her as such, she was not competent to impose any such condition and those persons would not have submitted to it. It appears that this condition was not complied with, for we find that in the record-of-rights and village administration paper of 1866 Pritu distinctly stated that she had no heir to succeed to her after her death. In the face of this statement we cannot hold that she admitted the plaintiffs to be her heirs.

"Upon a careful consideration of the evidence, oral and documentary, we are of opinion that it is not sufficient to prove the relationship claimed by the plaintiffs. It may be that plaintiffs are distantly related to Mohar Singh; but unless they can establish that they are his next reversioners, they cannot succeed in the suit, and this they have, in our judgment, failed to do. The defendants, it is true, do not point to any particular person as the heir to Mohar Singh; but that circumstance cannot help the plaintiffs. As the plaintiffs have come into court and their title is denied by the defendants, they were bound to prove their title by clear and satisfactory evidence, and in our opinion they have not been able to do so. It is urged that they are in possession of the remainder of the estate left by Pritu; but the evidence proves the contrary. As the plaintiffs have not established the title upon which they came into court, their suit should have been dismissed. We allow the appeal and setting aside the decree of the Court below dismiss the suit with costs."

From this decision the plaintiffs appealed to His Majesty in Council.

The appeal came on for hearing on June 21st, and was heard *ex parte*, the respondents not appearing. Previously to judgment being delivered, however, their Lordships granted an application by the respondents to be allowed to appear and be heard. The case was re-heard on the 8th of November.

Mr. *Mayne* for the appellants contended that on the evidence the plaintiffs had proved their title. They had proved that they were collateral heirs of Mohar Singh, and that they were descendants of the claimants, Bishan and his brothers, whose descent from a common ancestor with Mohar Singh was admitted in 1848 and made the basis of the arrangement between them and Pritu recorded in the proceedings of that year; and the plaintiff's claim is founded upon the relationship then set up and admitted.

There was no evidence, no suggestion even, that there were any other collaterals of Mohar Singh in existence, and the evidence given by the plaintiffs was sufficient to throw on the defendants, who had no title, the burden of proving that there

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were any heirs nearer than the plaintiffs. The supposed inconsistency referred to by the High Court between the statements of Bishan and Zorawar that Narpat and Khayali and Chaini and Ratan were "own brothers," is only apparently so, for the expression so translated, is one loosely applied to cousins. And the fact that the grandfather of Mohar was in 1848 called Chaini and is now called Partab is not material, the same man being obviously referred to under each name. It is submitted that the judgment of the High Court is against the weight of evidence, and should be set aside. As to the admissibility in evidence of the proceedings of 1847-48 and of the pedigree sections 13 and 32, clauses 5 and 6 of the Evidence Act (I of 1872) were referred to.

Mr. *Cowell*, for the respondents, contended that the High Court had rightly decided that the plaintiffs had failed to establish the title they set up. There is nothing in the proceedings of 1847-48 which evidenced or raised any presumption, as against the respondents, that the appellants were the collateral relations of Mohar Singh or entitled to inherit his estate. The High Court find that the relationship then claimed was repudiated on behalf of Pritu. She, however, then consented to the claimants' taking her estate after her death on certain conditions which appear to have been not complied with; for in 1866 Pritu stated that she "had no heirs to succeed her after her death." The plaintiffs, it is submitted, do not prove descent from a common ancestor with Mohar Singh: they do not produce the only genealogical table said to have existed in the family. All that they do produce to show their descent is a table of descent said to have been copied from some other document. The oral evidence as to their relationship is vague and unreliable. The statements made by Hira and Bahadur are inadmissible in evidence under section 32 of the Evidence Act, clauses 5 and 6; as they say they heard what they state from others since 1847, they are statements made, therefore, after the question in dispute was raised. The respondents hold under an alienation of the property made by Pritu, which, it is submitted, is valid by the usage then prevailing in Dehra Dun, and, having been made by her under justifiable legal necessity is binding on the plaintiffs.

Hunter's Gazetteer, p. 410, and the case of *Nobokishore Sarma* v. *Hari Nath Sarma* (1) were referred to. The plaintiffs are estopped by the transaction which took place in 1847-48 from disputing the respondents' right under the alienation by Pritu.

Mr. *Mayne* was not called upon to reply, and the appeal was allowed, their Lordships stating that they would give their reasons for their report on a subsequent day.

On the 30th of November 1901, the reasons for their lordships' report on the appeal were delivered by LORD DAVEY:—

The suit out of which this appeal has arisen was one for recovery of some jungle land called Guljawari. This land was formerly the property of one Mohar Singh, who died before the year 1847 and probably as early as 1835. The plaintiffs and present appellants claim to be the next-of-kin *ex parte paternâ* and heirs of Mohar Singh. The defendants and respondents claim under a title derived from his widow Pritu, who had been recognised as proprietor of the land at the settlement of 1847. Pritu died in 1892, and thereupon the appellants claimed to succeed on the footing of her having had only a Hindu widow's estate, and they allege that the alienation made by Pritu under which the respondents claim is invalid.

Issues were stated by the Subordinate Judge for the purposes of deciding the various questions which arise on the pleadings, the first issue being:—"Are the plaintiffs entitled to bring this suit?"

All the issues were decided by the Subordinate Judge of Dehra Dun in favour of the plaintiffs, and by his decree dated the 31st January, 1896, he ordered that the plaintiffs' claim be decreed with costs. The decree was reversed in the High Court of the North-Western Provinces. The learned Judges of that Court held that the plaintiffs had failed to make out their title as heirs of Mohar Singh, and therefore allowed the appeal and dismissed the suit without considering the other issues in the case. The first question, therefore, is whether the plaintiffs have proved their title.

The appellants have adduced both documentary and oral evidence in support of their title. But before considering the

(1) (1884) I. L. R., 10 Calc., 1108.

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evidence it will be convenient to state the outlines of the pedigree put forward by the appellants. They are the sons and grandsons of three brothers named Bishan, Sandal, and Zorawar. These three brothers were the sons of one Narpat, who was a direct descendant in the fourth degree of Hukmat, the alleged common ancestor. Mohar (it is said) was also descended in the fourth degree from Hukmat. His grandfather was called Chaini in the proceedings of 1847, but is referred to as Partab in the pedigree now put forward.

The documentary evidence consists of the Settlement Proceedings in 1847 and 1866. It is a little difficult to follow the proceedings before the Settlement Officer in 1847. Zorawar and Bishan both filed petitions claiming possession of the zamindari of Dain Adhoiwala, which includes the lands in suit. The story told by the claimants was that the property had been jointly purchased by Chaini, the grandfather of Mohar and Ratan, the grandfather of the claimants, and that on a division Chaini acquired Adhoiwala. Bishan said that Chaini and Ratan were own brothers; Zorawar described them as cousins. It is, however, apparent throughout these proceedings that the term "brothers" is used in a loose sense. What is meant by both deponents is that they were members of one family. Zorawar in his deposition says "now my right is this that Mohar Singh died leaving only his wife"; and the ground on which they sought immediate possession was that Pritu had forfeited her estate by misconduct. There is not a trace on these documents of the effective assertion of any title by Pritu otherwise than as widow of Mohar, and indeed the deposition of her mukhtar Sahib Singh shows what her title was. Their Lordships think it plain that the three brothers were then claiming as the heirs of Mohar and in no other character.

Mr. Ross, Superintendent of the Settlement Department, in his record of the proceeding before him, stated that after perusing the papers and hearing the statement of the parties it appeared that both the parties, *i.e.* the husband of the person now in possession (Pritu) and the claimants were the descendants of a common ancestor, and that Pritu was a widow having no heir or child. He further stated that Pritu being asked to state

who would be the owner of her estate after her death replied :— "If Zorawar, Bishan and Sandal, the claimants, undertake to pay the debt which is due by me on account of the revenue of this Dain or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death, but so long as I am alive I have every sort of power in respect of my estate." Mr. Ross seems to have advised or put pressure on the claimants to act according to the conditions alleged by Pritu and made an order accordingly.

The record-of-rights showing the shares in Dain Adhoiwala as prepared under Regulation IX of 1833 at the time of settlement in 1848 is as follows :—"As to the appointment of lambardar—after my death Zorawar, Sandal and Bishan who are own brothers will become the owners of this estate in equal shares, provided they pay the present and future debts and remain obedient to me, and one of them whom the Collector will think fit for lambardarship will be appointed lambardar."

These proceedings at least show that the claim of kinship now put forward is not a recent invention, but was made nearly fifty years before the commencement of the present suit, and was not then seriously controverted, if it was not in terms admitted. The learned Judges in the High Court decline to regard the statement of Pritu as an admission of relationship or recognition of the appellant's ancestors as her successors. The whole proceeding, however, is unintelligible on any other footing. Pritu could not designate her successors or bind the reversion after her death. On the other hand unless the brothers were assumed to be the then heirs of Mohar they had no interest in the matter. Whatever was said or done is not of course conclusive upon the respondents or perhaps standing alone very strong evidence in favour of the appellants; but their Lordships think it was a recognition on her part both that her husband's heirs (which is the character in which the three brothers claimed) were entitled to succeed her and also that she at any rate was not prepared to contest their claim to be such heirs. The rather unintelligible conditions which the three brothers were induced by Mr. Ross to acquiesce in as the price

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of a recognition of their title to succeed Pritu do not seriously detract from the general effect of the proceedings in 1847-48.

The learned Judges seem to find some contradiction to the entry made at the settlement of 1847-48 in the statement made by Pritu in the record-of-rights and village administration paper of 1867-67—"I have no heir to succeed me after my death. Therefore I cannot propose anything in regard to the office of lambardar."

This of course is strictly accurate if Pritu had only a widow's estate. Bishan, Sandal and Zorawar had claimed and the appellants now claim as heirs of Mohar and not as heirs of Pritu. This can hardly have been overlooked by the learned Judges.

The only oral evidence which need be noticed is that of two of the plaintiffs and appellants, Hira and Bahadur. Hira is a son of Bishan and he states the descent of his father and mother from the common ancestor in the same way as was stated in 1847 except that he calls Mohar's grandfather Partab instead of Chaini. He says he learnt the particulars of his family from his elders. He also says that he found an old genealogical tree in the house, but for some reason it was not produced, and the respondents do not appear to have pressed for its production. If it had been produced it would of course have been treated with suspicion. The learned Judges comment on his evidence because he does not know whether the father of Mohar Singh had any other son (it is not suggested that he had) or what was the name of the husband of Nando, the paternal aunt of Mohar, which seems a little hypercritical and also on the non-production of his genealogical tree.

Bahadur is the grandson of Zorawar, from whom he says he obtained information about his family pedigree. He also speaks of the names of ancestors being called out on the occasion of marriages and says that in performing the ceremonies of *sradh* and *tarpan* the names of the father, grandfather, and of all the ancestors he can remember are repeated. He adds a detail in the descent of Mohar from Hakumat Singh, *viz.* that Nupa who was Mohar's great-grandfather had three sons Chaini, Partab, and Chaila. This may account for the differences in the name of Mohar's grandfather in the pedigree of 1847 and that in the

present suit. One brother may have been mistaken for the other. The variation is not a mark of untrustworthiness, but rather points to a more careful investigation.

There is also evidence that Pritu in her life-time was on good terms with the appellant's family, and that Hira performed her funeral rights.

Both Hira and Bahadur were cross-examined at great length; but there is no suggestion throughout the cross-examination of any other person as a possible heir, nor is there any attempt to attack any particular link in the chain.

It is of course for the plaintiffs to make out their title and they can only succeed on the strength of their own title. But their Lordships think that the appellants have given admissible evidence which in the absence of any counter-evidence and in the circumstances, sufficiently supports their title.

Mr. *Cowell* suggested that all statements made to the witnesses Hira and Bahadur since the year 1847 were inadmissible under section 32(5) of the Indian Evidence Act as being made *post litem*. It does not, however, appear that the heirship of the then claimant was really in dispute at that time. Such a construction of the Act would practically exclude any attainable evidence in the present case.

This appeal was originally heard *ex parte*, and the only question on which their Lordships were called upon to pronounce an opinion was whether the appellants had sufficiently proved their kinship. Subsequently the respondent obtained leave to appear and put in a case and their Lordships having heard the respondent are now in a position to dispose of the whole case.

The only additional point argued by Mr. *Cowell* on the respondent's behalf was that the appellants are estopped by what took place in 1847-48 from disputing Pritu's right to alienate the property This argument fails both in fact and in law. There is no evidence of any representation on which to found an estoppel; and even assuming that the arrangement made by Mr. Ross amounted to a contract between the then claimants and Pritu, such a contract is not binding on the appellants. According to Indian law the claimants of 1847 were but expectant heirs with a *spes successionis*. The appellants claim in their own right as heirs of

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Mohar when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent.

Their Lordships have already intimated that they will humbly advise His Majesty that the order appealed from be reversed and that the decree of the Subordinate Judge should be restored.

The respondents will pay the costs of this appeal including t' ose of the first hearing.

Appeal allowed.

Solicitors for the appellants—Messrs. *Barrow, Rogers* and *Nevill.*

Solicitors for the respondent—Messrs. *Ranken, Ford, Ford* and *Chester.*

J. V. W.

APPELLATE CIVIL.

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August 2.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

MAKKA (JUDGMENT-DEBTOR) *v.* SRI RAM AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Joint decree—Sale in execution—Purchase by decree-holders—Receipt for part of decretal money given by one decree-holder on behalf of both—Sale set aside—Appeal—Civil Procedure Code, sections 244, 294, 311.

Two persons holding a joint decree caused certain immovable property of their judgment-debtor to be sold, and having obtained permission to bid, themselves became the purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders auction purchasers, but purporting to act in the name of, and on behalf of the other auction purchaser as well, asking that the purchase money should be set off against the amount due under the decree, and that to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount of the purchase money was given to the officer conducting the sale, and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under section 311 to the Subordinate Judge, asking to have the sale set aside. That application was rejected; but the Subordinate

* Second Appeal No. 575 of 1900 from a decree of F. E. Taylor, Esq., District Judge of Shahjahanpur, dated the 7th March 1900, reversing an order of Babu Nihala Chandra, Subordinate Judge of Shahjahanpur, dated the 18th November 1899.

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Judge, instead of confirming the sale, set it aside, on the ground that only one of the decree-holders auction purchasers had put in the receipt under the second clause of section 294, and directed a re-sale, and this notwithstanding that the other decree-holder admitted that the receipt had been presented on his behalf also. On appeal to the District Judge the order of the Subordinate Judge was set aside and an order passed confirming the sale. From this order the judgment-debtor appealed to the High Court on the sole ground that no appeal lay to the District Judge.

Held that the order passed by the Subordinate Judge was appealable as an order passed under section 224 of the Code of Civil Procedure.

In this case Sri Ram and Damodar Das obtained a decree against one Makka, in execution of which certain immovable property of the judgment-debtor was put up for sale. The decree-holders obtained permission to bid at the sale, and eventually became the auction purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders, auction purchasers, but purporting to act in the name of and on behalf of the other auction purchaser as well, asking that the purchase money should be set off against the amount due under the decree, and to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount of the purchase money was given to the officer conducting the sale, and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under section 311 of the Code to the Subordinate Judge, asking to have the sale set aside. That application was rejected. The Subordinate Judge, however, did not confirm the sale, but on the contrary set it aside and directed a re-sale on the ground that the presentation of the receipt by one only of the decree-holders, auction purchasers, was insufficient, even though the other admitted that the receipt had been presented on his behalf also.

On appeal to the District Judge the order of the Subordinate Judge was set aside and the sale confirmed. The judgment-debtor thereupon appealed to the High Court, his sole ground of appeal being that the order of the Subordinate Judge setting aside the sale was not appealable to the District Judge.

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Maulvi *Ghulam Mujtaba* for the appellant.

Pandit *Sundar Lal* (with Babu *Jogindro Nath Chaudhri* and Babu *Parbati Charan)* for the respondents.

BURKITT and CHAMIER, JJ.—The facts of this case are somewhat peculiar. The respondents in the present appeal, *i.e.* Sri Ram and Damodar Das, obtained a decree against the appellant Makka, in execution of which certain immovable property was sold. The decree-holders obtained permission to bid at the sale, and eventually became the auction purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders auction purchasers, but purporting to act in the name of, and on behalf of the other auction purchaser as well, asking that the purchase money should be set off against the amount due on the decree, and to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount of the purchase money was given to the officer conducting the sale, and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under section 311 to the Subordinate Judge asking to have the sale set aside. That application was rejected. One would have expected, then, that the Subordinate Judge, as provided by section 312, would have at once passed an order confirming the sale. He did not adopt that course, because he discovered that one only of the auction purchasers decree-holders had put in the receipt under the second clause of section 294. The learned Subordinate Judge held that the presentation of a receipt by one only of two joint decree-holders was insufficient. He therefore set aside the sale and directed a re-sale, notwithstanding that the other decree-holder admitted that the receipt had been presented on his behalf also.

On appeal to the District Judge, that officer set aside the order of the Subordinate Judge and passed an order confirming the sale. In this appeal the only point taken before us is, that no appeal lay to the District Judge. The learned vakil for the

appellant first of all contended that the order was purely interlocutory. This, however, he did not seriously press, and we do not think there is anything in it. His second and third contentions were, that the order was not appealable under section 588, nor was it appealable under section 244. Now the facts show that an application was made under the second clause of section 294: such an application can be made only by a person who is a decree-holder; the fact that the person who made the application had become an auction purchaser is immaterial; he is still none the less a decree-holder. The point which the Subordinate Judge had to decide was, whether the receipt put in by one decree-holder, acting both for himself and his co-decree-holder, was one which should be accepted, and on which part satisfaction of the decree should be entered up. In our opinion this is eminently a case under section 244; the question before the Court related undoubtedly to the execution and part satisfaction of the decree, and the parties before the Court were the parties to the suit, *i.e.* the decree-holder and the judgment-debtor, and they were disputing with one another in that capacity as to the part satisfaction of the decree. It is absolutely immaterial, in our opinion, that one of the parties on one side happened to be also the auction purchaser. In our opinion the order passed by the Subordinate Judge was a decree under section 244 of the Code of Civil Procedure, within the meaning of that word as defined in section 2 of that Code, and was therefore appealable to the District Judge. In this view it is unnecessary for us to consider the contention of the respondent that the appeal to the District Judge might be considered an appeal under section 588, clause (16), from an order under section 312, setting aside a sale of immovable property.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

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August 13.

Before Mr. Justice Knox, Acting Chief Justice, and Mr. Justice Blair.

CHANDI PRASAD (DEFENDANT) *v.* MAHARAJA MAHENDRA MAHENDRA SINGH (PLAINTIFF).*

Res judicata—Civil Procedure Code, section 13—*Assignment of the Government revenue of a village divided into "khatas"—Claim for interest on revenue in arrears—Decision as to one khata res judicata in respect of other khatas.*

The plaintiff was assignee of the Government revenue of a certain village. The village was divided into *khatas*, but the title to the revenue in respect of each and every *khata* was one and the same. The plaintiff sued to recover arrears of revenue due in respect of *khata* No. 29 with interest. On his right to receive interest being disputed, it was held that a previous decision of a competent Court between the same parties, but dealing with a claim for interest due on arrears of revenue payable in respect of *khata* No. 47, operated as *res judicata* as to the claim with regard to *khata* No. 29. *Ex parte Ador* (1), *Madhavi* v. *Kelu* (2), *Kunji Amma* v. *Raman Menon* (3) and *Balkishan* v. *Kishan Lal* (4) referred to.

The plaintiff in the suit out of which this appeal arose was the assignee of the Government revenue payable in respect of a certain village. The village was divided into a number of "khatas," and in the present suit the plaintiff claimed arrears of revenue due in respect of khata No. 29, with interest on such arrears. Both the Court of first instance and the District Judge on appeal decided in favour of the plaintiff that interest was payable; but on appeal by the defendant to the High Court it was held (5) that, as no interest on arrears of revenue was recoverable by Government, an assignee from Government could be in no better position, and that the plaintiff was therefore not entitled to recover interest on the arrears claimed by him. The respondent thereupon raised the further question whether his right to recover interest on arrears was not concluded in his favour by a former judgment between the same parties. In that former case the respondent had sued the appellant for arrears of revenue in respect of another khata of the same village, namely, No. 47, and for interest on such arrears. The Court of first instance (Assistant Collector) held that interest was not allowable; but on appeal the District Judge took a different view and held that the plaintiff was entitled to the interest

* Appeal No. 42 of 1900, under section 10 of the Letters Patent.

(1) (1891) 2 Q. B. D., 574.
(2) (1892) I. L. R., 15 Mad., 264.
(3) (1891) I. L. R., 15 Mad., 494.
(4) (1888) I. L. R., 11 All., 148.
(5) Weekly Notes, 1900, p. 173.

claimed. That decree was not appealed and became final as between the parties to the present suit. The question of *res judicata* thus raised led to a difference of opinion between the Judges composing the Bench by which the appeal was heard. In accordance with section 575 of the Court of Civil Procedure the Judgment which prevailed was that of Aikman, J., who held that the former decision made the plaintiff's claim for interest a *res judicata*. From this judgment the defendant appellant preferred an appeal under section 10 of the Letters Patent.

Pandit *Madan Mohan Maliviya*, for the appellant.

Munshi *Ratan Chand*, for the respondent.

KNOX, ACTING C.J. and BLAIR, J.—This case has been argued with great force and ability by the learned vakil for the appellant. The matter which is before us for determination is whether the liability of the appellant to pay interest on certain arrears of land revenue over a particular area is or is not *res judicata*. No other point is before us. In order to understand what led up to the present plea it is only necessary to set out that the respondent in a previous suit instituted a claim for arrears of Government revenue to which he alleged that he was entitled and which arose out of what is known as *khata* No. 47 in mauza Fatehpura. In addition to the arrears of Government revenue which he claimed, he also sued for interest. The respondent is assignee of Government revenue in mauza Fatehpura, and apparently this mauza consists of several *khatas*. In that suit the present appellant was defendant. He contested *inter alia* the liability to pay interest. His contention was that arrears of Government revenue did not carry interest with them. The Government could not have claimed interest, and an assignee of Government revenue was in no better position and therefore could not claim interest. The issue whether the defendant was liable to pay interest on arrears of assigned land revenue was heard and determined, and the final determination was that the defendant was liable. In the suit out of which the present appeal arises the claim was for arrears due on account of *khata* No. 29 and not on account of *khata* No. 47. The same matter, namely, whether the appellant was liable to pay interest upon arrears of Government revenue, was put in issue. Curiously

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enough, the appellant in his written defence expressly stated that the claim for interest was barred by section 13 of the Code of Civil Procedure. The issue as framed by the Court of first instance runs thus:—"Is the plaintiff entitled to receive interest on the principal amount claimed, and has this point been previously decided." This issue was determined by that Court in the respondent's favour. The question was again raised by the appellant in appeal, and the lower appellate Court held that interest was payable. Neither of the Courts below in so many words touched upon the question of *res judicata*. Whatever determination there had been was in favour of the respondent; and as he won in both Courts he was under no necessity of raising it. In this Court, however, the learned Judges came to the conclusion that interest was not payable, and the learned counsel for the respondent seems at once to have put forward the plea that this liability had been in issue, had been previously heard and determined, and could not be put in issue again. The learned Judges before whom the plea was raised held different views. The result was that the order of our brother Aikman, which affirmed the decree of the Court below, prevailed. But as our brother Banerji differed from him, the matter was open to appeal and has resulted in the appeal which is now before us.

The learned vakil for the appellant admitted in his argument that in both the suits, namely, that which was decided by the District Judge on the 1st of June, 1897, and that out of which the present appeal has arisen, the parties are the same; they are litigating under the same title; and the Court in which the issue was previously raised was a Court of jurisdiction competent to try the suit in which the issue has now been subsequently raised. He, however, contends that inasmuch as the suit of 1897 was for arrears of revenue due upon *khata* No. 47, and the present suit is for arrears of revenue due out of *khata* No. 29, the matter in issue in the previous suit cannot be said to be directly and substantially in issue in the present suit. In other words, according to him, identity of subject-matter is a material ingredient in all questions of *res judicata*, and where the subject-matter in both the suits is not identical, it would not be safe for Courts of Justice to hold that an issue, however apparently the same in

both cases, was in reality the same. Other considerations might easily be conceived to arise which would alter the whole aspect of the two cases and make them materially different. In his argument he adopted the reasoning which appears to have had great weight with our brother Banerji. He asks us to consider whether if two bonds are executed by the same debtor in favour of the same creditor on exactly similar terms with no point of difference between them, and if in a suit brought on the basis of one of the bonds the question arose whether under the terms of that bond interest was payable, a decision on that point would operate as *res judicata*, were the same question to arise upon a suit brought on the second bond. The fallacy which underlies this argument appears to us to be that in the case of the two bonds two separate titles exist, and the holder of the bonds when litigating upon bond *A* is not litigating upon the same title as when he litigates upon bond *B*. Now such circumstances are widely different from those which we have to consider in the present appeal. The title under which the plaintiff claims the arrears of revenue, whether they accrued due on *khata* No. 29 or on *khata* No. 47, is one and the same title. Putting aside, however, the case of the two bonds, we really have to come back to consider whether under the Statute Law in India identity of the subject-matter is or is not material whenever a plea of *res judicata* has to be considered. In coming to a conclusion upon this we cannot fail to take notice of the difference between the language in which section 2 of Act No. VIII of 1859, and that in which section 13 of Act No. XIV of 1882, is couched. There is no express allusion to the subject-matter in section 13. The result or the fruit of the litigation at which the parties are aiming is no longer a matter for consideration of the Courts. What is to be considered is, if the metaphor may be extended, the root of the difference between them, and the Courts are now forbidden to try any issue in which the matter directly and substantially in issue in the subsequent suit had been directly and substantially in issue in the former suit. This is more in accordance with the principles on which the rule of *res judicata* is founded. Those principles are two in number—the one, public policy, that it is in the interest of the State that there should be an end of litigation; and

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the other, the hardship on the individual that he should be vexed twice for the same cause. The root of the matter between the parties, whether it related to *khata* No. 29 or to *khata* No. 47, is the liability of the defendant to pay interest on arrears of Government revenue. The defendant put that into issue in the previous suit of 1897. He was unsuccessful in the litigation which then ensued. Can he, or should he now be allowed to re-open that litigation merely because he says that since that suit was decided there is another plot of land, the revenue of which is held under the same title and under precisely the same circumstances under which the revenue of the former parcel was held, but as it is a different parcel, I ask now to be allowed to commence a new litigation in the hopes that the Court may arrive at a different conclusion with regard to parcel *B* from that at which it arrived with regard to parcel *A*? There would be no end to the litigation which might ensue if in respect of each parcel the litigation might be re-opened. Both the principles upon which the plea of *res judicata* rests would be violated if we allowed this contention to prevail. It is not as if the respondents were able to say to us there exists with regard to plot No. 47 a fact which did not exist in the case of plot No. 29, and which so materially alters the circumstances of the case that the matter directly and substantially in issue in the two cases is only apparently and not in reality the same. Again, it would be different if the appellant were able to say that the matter directly and substantially in issue in the former suit fell short of going to the very root of the title upon which the claim rests. Neither of these assertions are or can be made in the present case. The previous judgment affirms positively the title of the plaintiff to recover interest upon arrears of the Government revenue which has been assigned to him in respect of mauza Fatehpura, and the plaintiff cannot now reagitate the same question of liability upon the pure and simple incident that the subject-matter of the present suit is geographically distinct from the subject-matter of the previous suit.

The learned vakil called our attention to the case *Ex parte Ador* (1). In our opinion that case lends no support to the

(1) (1891) 2 Q. B. D., 574.

appellant's contention. It is one of a highly exceptional character, and from it no general conclusions can be drawn adverse to the principle of *res judicata*. The debtors had guaranteed the repayment of a loan of £1,000 with interest. The loan was to be repaid by a gradual amortisation of 20 per cent. from a given date. The first annual instalment was due in April, 1890, but before that date the debtor Ador had become a bankrupt, and a receiving order had been made against him. From that date the status of the parties was essentially altered. Instead of the creditor being entitled to gradual repayment as stipulated in the guarantee, he was under the bankruptcy law entitled to immediate payment. The order by which it was contended that the claim of the creditor for interest was precluded by the principle of *res judicata* was an order rejecting his claim to interest for a short period before and up to the receiving order. From that moment the status of the parties was materially altered, their rights were substantially modified by the provisions of the law of bankruptcy, and their claim had ceased to be based upon and limited by their purely contractual relation. The creditor was therefore suing under a different title and was not prevented in the fresh litigation from re-opening the question of the debtor's liability to pay interest. In the words of the judgment of the Court "the point before the Court now is a totally different one and ought to be decided on its merits, although that course renders it necessary to reconsider the construction of the letter in question," that is, of the letter which had received a different construction in the previous order.

He also referred us to *Madhavi* v. *Kelu* (1). Undoubtedly there is a portion of the judgment in that case which is in his client's favour; but we notice that the learned Chief Justice, who was a party to that decision, was also a party a month later to the decision in *Kunji Amma* v. *Raman Menon* (2), in which (at p. 497) he laid down that "It is the matter in issue in the "suit that forms the essential test of *res judicata*—*Pahlwan* "*Singh* v. *Risal Singh* (3). The matter in issue in the present "suit, *viz.* the title of the *tarwad* or of the *devasom*, was one

(1) (1892) I. L. R., 15 Mad., 264. (2) (1891) I. L. R., 15 Mad., 494.
(3) (1881) I. L. R., 4 All., 55.

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"within the cognizance of the Subordinate Court, and it having "been decided in the former suit, we do not think that the "plaintiffs are entitled, by merely adding the Raja of Cochin as "a party defendant, to call upon the District Court to decide an "issue which has already been decided by a Court of concurrent "jurisdiction." Now this is precisely what we hold in the present appeal. It is the matter in issue by which we are to be guided in deciding whether a plea of *res judicata* should or should not prevail. The matter in issue here, namely, the liability to interest upon arrears of Government revenue having been decided in the former suit, we do not think that the defendant is entitled, by merely pleading that the fraction to which the matter in issue refers in the present suit is not the same fraction to which it referred in the previous suit, to call upon the Courts to decide an issue which has already been heard and determined by a Court of competent jurisdiction. Lastly, he referred as to the case of *Balkishan* v. *Kishan Lal* (1). As we understand that judgment, it is against the appellant. We should be prepared to hold that where the previous judgment negatives the liability, the main obligation itself, the defendant cannot re-agitate the same question of liability by saying that it refers to another portion of the property over which the whole liability, whatever its nature may be, is one and the same. It is always a serious matter to perpetuate a wrong decision, and we can quite understand our brother Banerji's reluctance to affirm the liability which in his view has been wrongly imposed by the Judge of Agra. But where the provisions of the law are so clear and emphatic as in section 13 of the Code of Civil Procedure, we find no option but to follow them. The question, moreover, arises whether it is not a more serious matter that opportunities should be given for protracted litigation than that a judgment apparently wrong should be affirmed. For these reasons we hold that the question of liability of the defendant to pay interest on arrears of land revenue is *res judicata*, and is a bar to the re-determination of that issue. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1888) I. L. R., 11 All., 148.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

1901
August 13.

BELA BIBI (DEFENDANT) *v.* AKBAR ALI (PLAINTIFF).*

Pre-emption—Muhammadan Law—Mortgage by a successful pre-emptor of the pre-empted property to a stranger—Pre-emptive rights of decree-holder not thereby destroyed.

The plaintiff in a pre-emption suit having obtained a decree for possession, in order to provide the means of paying the pre-emptive price mortgaged the property, the subject of the suit, to a stranger. *Held* that, whatever rights the mortgage to a stranger might or might not give rise to in the future, the successful plaintiff did not by that transaction forfeit the fruits of her decree. *Rajjo* v. *Lalman* (1) distinguished. *Ram Sahai* v. *Gaya* (2) referred to.

THE facts of this case are fully stated in the judgment of Burkitt, J.

Pandit *Moti Lal Nehru* and Maulvi *Muhammad Ishaq*, for the appellant.

Maulvi *Ghulam Mujtaba* (for whom Pandit *Baldeo Ram Dave*), for the respondent.

BURKITT, J.—This is one of three appeals in a pre-emption suit against a decree of the District Judge of Azamgarh declaring that the appellant Musammat Bela had forfeited her pre-emptive rights, and giving a decree for possession of the pre-empted property in equal shares to two other rival claimants, one of whom is the respondent, Mir Akbar Ali.

The property, the subject of the pre-emption claim, consists of a 4 pie share which belonged to one Waris Ali. On October 20th, 1898, Waris Ali conveyed that property by sale to one Muhammad Ali, who is admittedly a "stranger."

Thereupon on October 2nd, 1899, the appellant Musammat Bela Bibi instituted a pre-emption suit against the vendor and vendee, and obtained a decree by consent on November 14th, 1899. The decree was for possession of the pre-empted property on payment of the sale consideration, Rs. 975, within a limited period to the vendee. Not having so much ready money available Musammat Bela Bibi on December 6th, 1899, mortgaged the pre-empted share for Rs. 1,500, paid the Rs. 975 into Court

* Second Appeal No. 788 of 1900, from a decree of J. H. Cumming, Esq., District Judge of Azamgarh, dated the 14th April, 1900, confirming a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February, 1900.

(1) (1882) I. L. R., 5 All., 180. (2) (1884) I. L. R., 7 All., 107.

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on December 8th, 1899, and was put into possession of the pre-empted share on January 7th, 1900.

Meanwhile the respondent Akbar Ali had on October 5th, 1899, instituted a suit for possession by pre-emption of the same property. Among the defendants he impleaded Musammat Bela Bibi and another rival pre-emptor, one Maula Bakhsh.

The summons to appear and defend the suit was not served on Musammat Bela Bibi till three days after November 14th, which was the date on which she obtained her decree for possession of the pre-empted property.

In Akbar Ali's plaint there is only one paragraph which affects the appellant Musammat Bela Bibi. That is the 5th paragraph, in which the respondent charges Musammat Bela Bibi with having instituted a collusive pre-emption suit, as, he says, her father had done on a previous occasion. This is the only reference in the plaint to the appellant. It is to be noticed that Akbar does not allege that he possessed a pre-emptive right superior or preferential to that of Musammat Bela Bibi. Indeed he rather implies the contrary in the same paragraph, where he alleges that Musammat Bela's father had "a preferential right as against the plaintiff's (Akbar Ali's) ancestor" in a former suit for this same property.

In her written statement Musammat Bela Bibi asserted her superior right of pre-emption, and denied the existence of any collusion between her and the vendee.

On these pleadings the parties went to trial. Five issues were fixed by the Court of first instance, but none of them raised the plea on which the decisions of the lower Courts are chiefly founded, namely, that Musammat Bela Bibi had forfeited her pre-emptive right by the fact that she executed the mortgage of December 6th, 1899, to raise the money to comply with the terms of her decree. That document had not been executed at the date of Akbar Ali's suit, nor until after the pleadings in that suit had been filed and issue joined on the pleadings.

Eventually the Court of first instance held that all three claimants for pre-emption were on the same level and had equal rights, but further held as to Musammat Bela Bibi that she had forfeited her rights by reason of the mortgage of December

6th, 1899. The Court also rejected the claim of Maula Bakhsh, finding him guilty of collusion. A decree for pre-emption of the whole property was given in favour of Akbar Ali on payment of a certain sum. This decree did not purport to set aside or in any way to interfere with the decree obtained by the appellant on November 14th, 18.9. From that decree three appeals were taken before the District Judge, namely, one by Musammat Bela Bibi and two by Maula Bakhsh.

In Musammat Bela Bibi's appeal the District Judge held that her pre-emptive rights were superior to those of Akbar Ali, but found that she had forfeited them by executing the mortgage of December 6th, 1899.

On second appeal to this Court Musammat Bela Bibi contends, among other matters which need not now be referred to, that the lower appellate Court was wrong in holding that she had forfeited her pre-emptive rights. For the respondent in support of the decree of the lower Court it was objected, under section 561 of the Code of Civil Procedure, that the Court below was wrong in holding that the appellant possessed a right of pre-emption superior to that of the respondent Akbar Ali. I will dispose of this matter first. I am of opinion that the District Judge is right, and for the reasons given by him, in holding that Musammat Bela Bibi had a preferential right. Indeed, as pointed out above, Abkar Ali must be taken to have admitted this in his plaint, where he stated that in respect of this same property Musammat Bela Bibi's father had a right of pre-emption superior to that held by his predecessor in title. The vakil who appeared for the respondent laboriously and volubly spent much time in addressing us on the interpretation to be put on the words "hissadar karibi" in a wajib-ul-arz relating to a pure zamindari village, quite ignoring and not contesting the finding of the lower appellate Court that the village had been partitioned into thokes and sub-divisions of thokes, and therefore could not be considered to be pure zamindari. His arguments therefore do not require any notice. As to Musammat Bela Bibi's appeal, I notice that the decisions of the two lower Courts that she had forfeited her pre-emptive rights are largely founded on the case of *Rajjo* v. *Lalman* (1).

(1) (1882) I. L. R., 5 All., 180.

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In my opinion that case has no bearing whatever on the question here. In that case Musammat Rajjo was the plaintiff in a pre-emption suit, who before suit had mortgaged to third parties the property which she subsequently sought to recover by right of pre-emption. It was held by this Court as between the pre-emptor and the vendor and vendee, that in consequence of having executed that mortgage she had disqualified herself from enforcing her pre-emptive rights. In the case now under appeal Musammat Bela Bibi is not the plaintiff, nor has she asked the Court to grant her a pre-emptor's decree for possession of the disputed share. She had already obtained that relief by the decree in her own suit. The plaintiff is Akbar Ali, a person who possesses a right of pre-emption, but one which is inferior to that of the appellant. He it is who has asked the Court in this case to give him a pre-emptor's decree for possession of the property. The case cited above does not apply to the facts of this case, and I am not inclined to extend further the principle on which that case depends. The respondent had of course to get rid of the appellant's superior right, but the only allegation he made against her in the plaint was that she had had instituted a collusive pre-emptive suit. By this allegation I presume he meant that the plaintiff when instituting her suit intended in some way with the connivance of the vendee to leave the property in the hands of the latter. The only facts alleged in proof of this collusion are firstly that appellant's father did something of the kind some time ago in another suit. This is really too absurd, and I am n t a little surprised that the two lower Courts should have paid any attention to such an allegation. Then it is said, appellant got a decree in her suit on a compromise without contesting the amount of the consideration money, and that therefore the suit was collusive. There is in my opinion nothing in this matter. It means no more than that the vendee knowing he had no case against appellant forebore to defend a hopeless suit, and that Musammat Bela Bibi, rather than go to the trouble and expense of producing witnesses to prove a negative (namely that full consideration had not passed), accepted as correct the purchase money set forth in the deed of sale of October 20th, 1898. And further she admittedly paid that amount into Court, and was put into possession of the

disputed shares. She may have paid a high price, but as she admittedly did pay it there is no more to be said. In my opinion nothing has been established on which it is possible to find collusion between the appellant and the vendee. As to the question of forfeiture I have shown above that the case of *Rajjo* v. *Lalman* is not in point. It would, I think, be most dangerous to extend to the facts of this case the doctrine laid down in the case just cited. I know of no case in which it has been held that a person in the position of the appellant, that is to say, one who has obtained a decree for possession of certain property on paying a certain sum, and who raised money on the security of that property to pay off the purchase money, thereby forfeits his pre-emptive rights. The plaintiff's act in raising money by a mortgage of that property is not inconsistent with the object for which the pre-emption suit was brought. The money was raised on mortgage for the purpose of perfecting the decree for possession she had already obtained, and which she perfected by paying the sum due and obtaining possession. No doubt she borrowed the money and gave the mortgage while Akbar Ali's suit was pending. But she had no knowledge of his suit for three days after she obtained the decree in her own suit. Was she then bound, though knowing she had the superior claim, to put off all attempts to perfect her decree until the respondent's suit had been decided, and so forfeit the benefit of her decree by not paying up the purchase money within time? Had she acted in that manner, the two lower Courts would no doubt have treated her act as further evidence of collusion.

For the above reasons I am of opinion that the Courts below were wrong in holding that the appellant forfeited her pre-emptive rights. I would therefore allow this appeal, and, setting aside the decree of the lower Courts, I would dismiss the respondent's suit with costs in all Courts.

CHAMIER, J.—The first question which we have to decide in this case is whether the appellant Musammat Bela Bibi has a right of pre-emption superior to that of the respondent Akbar Ali.

This case came before me sitting alone and was referred by me to a Bench of two Judges. At that hearing counsel for the

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respondent admitted that the appellant had a preferential right of pre-emption. At the present hearing the respondent appeared by other counsel who preferred to argue the point.

The wajib-ul-arz of the village provides that pre-emption may be claimed firstly, by *hissadar karibi*; secondly, by co-sharers in the same thoke as the vendor; thirdly, by co-sharers in other thokes; and fourthly, by relations of the vendor.

The appellant and the vendor were co-sharers in the same sub-division of the thoke. The respondent Akbar Ali holds a share in a different sub-division of the thoke.

In villages of pure zamindari tenure where there was nothing to which such words as *karibi*, *nazdiki* and *mukaribat* could apply except to relationship with the vendor, it has been held that those words in the wajib-ul-arz applied to relationship—see, for example, *Gursaran* v. *Akhandanand* (1) and *Muhammad Sadi* v. *Muhammad Abdul Razzak* (2); but where that was not the case such words have been held to apply, not to relationship, but to holders of shares in the same sub-division of the village or tenure, in one case a *khata* and in another a thoke—see *Mahadeo Prasad* v. *Sabiha Bibi* (3) and *Balzor Rai* v. *Madho Rai* (4). In fact it is a question which must be decided in each case with reference to the terms of the particular wajib-ul-arz and the circumstances of the village and tenure.

In the present case it appears to me that the words *hissadar karibi* do not refer to relations of the vendor. They are provided for as a separate class. Having regard to the scheme provided by the wajib-ul-arz, I think that the word *karibi* refers to co-sharers who are near to the vendor in some sense other than relationship. In my opinion the lower appellate Court was right in holding that the appellant being a co-sharer of the vendor in the same sub-division of the thoke was a *hissadar karibi* as compared with the respondent, who is only a co-sharer in the same thoke.

The next question is whether the appellant has, as found by the Courts below, forfeited her right of pre-emption by having mortgaged the share in question to a stranger during the pendency of the suit brought by the respondent Akbar Ali.

(1) Weekly Notes, 1890, p. 227.
(2) Weekly Notes, 1891, p. 137.
(3) Weekly Notes, 1887, p. 260.
(4) Weekly Notes, 1895, p. 78.

I have found some difficulty in arriving at a decision on this question.

What Bela Bibi did was this :—She sued the vendor and vendee for pre-emption, and after having obtained a decree she mortgaged the share in question in order to obtain funds wherewith to comply with the terms of the decree. So far it would appear on the authority of the decision of this Court in *Ram Sahai* v. *Gaya* (1) that she did nothing which could prevent her from claiming the property from the vendee. In fact in the present case she took out execution of the decree and obtained possession. But it is said that, as the suit of the present respondent against her was then pending, she brought herself within the rule laid down in *Rajjo* v. *Lalman* (2), in which it was held that a co-sharer in a village who had under the wajib-ul-arz a preferential right to the mortgage of a share in that village forfeited such right by mortgaging such share to a stranger in anticipation of the success of her suit to enforce that right. The reasons for that decision seem to be that a right of pre-emption being a personal right cannot be made the subject of sale or bargain of any kind, and that the plaintiff could not be allowed to complain of the infringement of a right which she herself had also infringed. In the later case in 7 Allahabad it was said that the principle established by the decision in *Rajjo* v. *Lalman* was that when a pre-emptor in anticipation of his success in a pre-emption suit transfers the "pre-emptional" property in any manner inconsistent with the object of the suit for pre-emption, the plaintiff forfeits his right and his suit would be dismissed.

There are several points on which that cass differs from the one now before us :—In the present case the appellant did not mortgage the share until she had obtained a decree for it against the vendee, and she is not a plaintiff complaining of the infringement of a right. At the date of the respondent's suit he had no right (according to my interpretation of the wajib-ul-arz) to obtain a decree against the appellant. It has been held that the right of a plaintiff suing for pre-emption must remain firm up to the date of the decree [See *Ram Gopal* v. *Piare Lal* (3)], but

(1) (1884) I. L. R., 7 All., 107. (2) (1882) I. L. R., 5 All., 180.
(3) Weekly Notes, 1899, p. 163.

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it does not follow that a person having the best right to pre-empt, who enforces that right and actually takes possession from the vendee should be compelled to surrender her acquisition merely because, after she has established her right, she mortgages the property to a stranger.

On the other hand it may be said that where, as here, rival pre-emptors are parties to a suit, the pre-emptor who is arrayed as defendant to the suit is none the less a claimant to the right of pre-emption, and that the rules which require a plaintiff not to deal with his right of pre-emption apply with equal force to a defendant in such a case as this. There is considerable force in this contention, but on consideration I have come to the conclusion that we should not hold that the appellant has forfeited her right of pre-emption. She obtained her decree for pre-emption before notice of Akbar Ali's suit was served upon her. She did not bargain with her right of pre-emption, but what she dealt with was the property which she had established her title to. A person who establishes her right of pre-emption by suit, and takes possession under the decree, and then proceeds to mortgage the property to a stranger cannot be called upon to surrender the property to a person having an inferior right of pre-emption, though the mortgage in such a case may give rise to a fresh right of pre-emption. In the present case I think that Bela Bibi had arrived at a stage when she was entitled to deal with the property without thereby forfeiting her right to it.

It was said that all the proceedings in Bela Bibi's suit were held in the interest of the vendee. That was not the case put forward in the first Court. The Subordinate Judge drew up a *rubkar* in which the allegations of the defendant Akbar Ali are set out. They amount to nothing more than that Bela Bibi in exercising her right of pre-emption was actuated by the desire to prevent Akbar Ali and others from pre-empting the property.

I concur in the order proposed by my learned colleague.

BY THE COURT.—The order of the Court is that this appeal be allowed, the decrees of the two lower Courts be set aside, and the suit of Akbar Ali be dismissed with costs in all Courts.

Appeal decreed.

1901
August 14.

Before Mr. Justice Burkitt and Mr Justice Chamier.

MEGH SINGH (DEFENDANT) v. TIKA RAM (PLAINTIFF).*

Act No. XII of 1881 *(North-Western Provinces Rent Act), section* 56*—Landholder and tenant—Distraint—Hypothecation for rent of produce of land.*

Held, on a construction of section 56 of Act No. XII of 1881, that when the rent of a tenant is in arrears the landlord is entitled to distrain any crop growing on the tenant's holding, no matter by whom that crop was sown. *Geetum Singh* v. *Buldeo Kahar* (1), and *Fatima Begam* v. *Hansi* (2) referred to.

THE facts of this case were as follows:—Megh Singh levied a distress against Sewa Ram, Musammat Kishori and Chote Singh. Tika Ram contested it on the ground that the crops distrained were his, and could not be distrained for an arrear due from Sewa Ram and others. The Court of first instance (Assistant Collector) held that the distress was valid, and dismissed the claim, finding that the plaintiff was in the position, as regards the defendant, of a sub-tenant. The plaintiff appealed. The lower appellate Court (Additional District Judge of Agra) holding that even if the plaintiff was a sub-tenant, that would not entitle the defendant to distrain his crops, and that there had been no finding as to the ownership of the crops, remanded the suit for trial under section 562 of the Code of Civil Procedure. Against this order of remand the defendant appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

BURKITT, J.—In my opinion the decision of the Officiating District Judge in this case is wrong. When the rent of a tenant (in this case an occupancy tenant) is in arrear, the landlord is, I think, entitled to distrain any crop growing on the tenant's holding, no matter by whom that crop was sown. This seems to me to be the clear meaning of the words "the produce of all lands in the occupation of a cultivator shall be deemed to be hypothecated for the rent payable in respect of such land." In my opinion it makes no matter whether such crop was sown, as in this

* First Appeal No. 190 of 1900 from an order of Lala Baijnath, B.A., Rai Bahadur, Additional Judge of Agra, dated the 22nd September 1900.

(1) (1872) 4 N.-W. P., H. C., Rep., 76. (2) (1887) I. L. R., 9 All., 244.

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case, by the sub-tenant of an occupancy tenant or by the occupancy tenant himself. This is the view that was taken by this Court in the case of *Geetum Singh* v. *Buldeo Kahar* (1) and in the observations of the late Chief Justice in the case of *Fatima Begam* v. *Hansi* (2). A similar rule has has been adopted by the Board of Revenue. It may be that the wording of section 56 is open to some possible argument, but I am of opinion that that question is now covered by authority. I would allow this appeal, and, setting aside the order of the lower appellate Court, restore the decree of the Court of first instance with costs in all three Courts.

CHAMIER, J.—I concur on the ground that the question has been settled by the authorities to which my learned colleague has referred.

BY THE COURT.—The order of the Court is that the appeal be allowed, that the remand order of the lower appellate Court is set aside, and the decree of the Court of first instance restored, with costs in all Courts.

Appeal decreed.

1901
August 15.

Before Mr. Justice Burkitt and Mr. Justice Chamier.

KALIAN RAI (PLAINTIFF) *v.* RAM CHANDAR (DEFENDANT).*

Hindu Law—Mitakshara—Succession—Question of priority between the son of the paternal uncle of the deceased and his brother's grandson.

Held that according to the Hindu law of the Mitakshara school the grandson of a brother is a nearer *sapinda* than the son of a paternal uncle. *Sambhoo Dutt Singh* v. *Jhootee Singh* (3), *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (4), *Kureem Chand Gurain* v. *Oodung Gurain* (5), *Oorhya Kooer* v *Rajoo Nye* (6), *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (7) and *Suba Singh v. Sarfaraz Kunwar* (8) referred to. *Suraya Bhukta* v. *Lakshminarasomma* (9) dissented from.

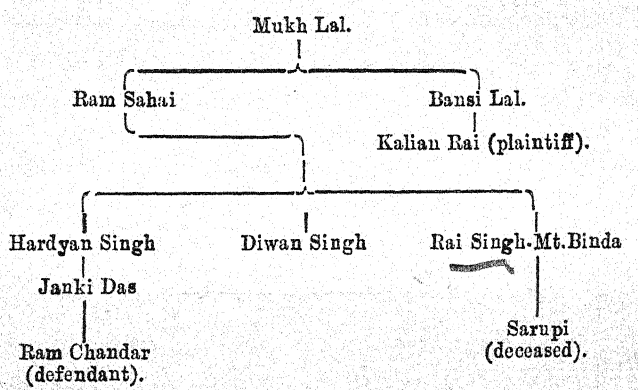
THIS appeal arose out of a suit in which the plaintiff, Kalian Rai, laid claim to the estate of one Rai Singh, the son of the

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* Second Appeal No. 267 of 1899, from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 6th January, 1899, reversing a decree of Pandit Kunwar Bahadur, Munsif of Muzaffarnagar, dated the 7th February, 1898.

(1) (1872) 4 N.-W. P., H. C. Rep, 76.
(2) (1887) I. L. R., 9 All, 244; at p. 247.
(3) S. D. A., L. P., 1855, p. 382.
(4) (1839) 2 Moo., I. A., 133.
(5) (1866) 6 W. R., C. R., 158.
(6) (1870) 14 W. R., C. R., 208.
(7) (1870) 13 Moo. I. A., 373.
(8) (1896) I. L. R., 19 All., 215.
(9) (1881) I. L. R., 5 Mad., 291.

plaintiff's uncle. The pedigree of the family, so far as it concerns the present suit, was as follows:—



The defendant Ram Chandar was thus the grandson of one of the brothers of Rai Singh. The plaintiff alleged that Ram Chandar having been adopted by one Jawahri had no claim whatever to the estate of Rai Singh, to the whole of which he asserted that he himself was entitled. The defendant denied that he had been adopted by Jawahri and contended that he was entitled to the entire property of Rai Singh, of which he said he had been in possession since the death of Musammat Sarupi, the daughter of Rai Singh.

The Court of first instance (Munsif of Muzaffarnagar) held that the plaintiff had failed to prove Ram Chandar's adoption by Jawahri; but relying on the rule of law laid down in *Suraya Bukta* v. *Lakshminarasamma* (1), gave the plaintiff a decree, holding that "grandsons" not being included in the word "sons" the defendant as grandson of the brother of the propositus was not entitled to succeed in preference to the plaintiff, who was the son of the paternal uncle of the propositus.

The defendant appealed. The lower appellate Court (Subordinate Judge of Saharanpur) held that the defendant had a preferential right to succeed as against the plaintiff, and set aside the decree of the Munsif and dismissed the plaintiff's suit. The Subordinate Judge referred to the ruling in *Suba Singh* v. *Sarfaraz Kunwar* (2).

From this decree the plaintiff appealed to the High Court.

(1) (1881) I. L. R., 5 Mad., 291. (2) (1896) I. L. R., 19 All., 215.

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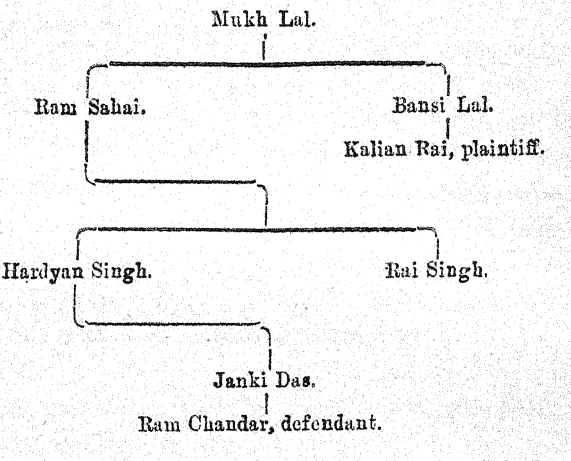
KALIAN RAI v. RAM CHANDAR.

Munshi *Jang Bahadur Lal*, for the appellant.

Mr. *S. S. Sinha*, for the respondent.

BURKITT and CHAMIER, JJ.—This appeal arises out of a suit brought by the appellant Kalian Rai against the respondent Ram Chandar for possession of the immovable property of one Rai Singh, deceased.

The following genealogical table shows the relationship of the parties to the deceased :—



The parties are admittedly governed by the Hindu law of the Mitakshara school. The question which we have to decide is which of the parties (who are both equally near in degree to the propositus) has a preferential right to succeed—the plaintiff as the uncle's son of the deceased, or the defendant as the brother's grandson of the deceased.

The Munsif decided in favour of the plaintiff; but on appeal his decree was reversed by the Officiating Subordinate Judge. Hence this appeal by the plaintiff.

The Mitakshara provides that—

"On failure of the father, brethren share the estate." Chapter II, section IV, verse 1.

"On failure of the brothers also, their sons share the heritage."—*Ib.*, verse 7.

"If there be not even brothers' sons, gentiles *(gotraja)* share the estate: gentiles are the paternal grandmother and *sapindas* and *samanodacas*."—Section V, verse 1.

"On failure of the paternal grandmother, the *gotraja sapindas*, namely, the paternal grandfather and the rest, inherit the estate."—Section V, verse 3.

"Here on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons."—Section V, verse 4.

"On failure of the paternal grandfather's line, paternal great-grandmother, the great-grandfather, his sons and their issue inherit. In this manner must be understood the succession of (other) *gotraja sapindas*."—Section V, verse 5.

"If there be none such, the succession devolves on *samanodacas*."—Section V, verse 6.

There has been considerable conflict of opinion as to whether the brother's grandson is entitled to succeed immediately after, and in default of the brother's son, and if not, what place should be assigned to him.

The Viramitrodaya does not actually mention the brother's grandson; but inasmuch as the author considers that the degree of spiritual benefit conferred upon the deceased proprietor should determine the preferential right of claimants to inheritance, who are in the same degree, it may be supposed that he would have preferred the brother's grandson to the paternal uncle's son, for the former offers an undivided oblation to the father of the deceased. As to how far this view of the author of the Viramitrodaya can be accepted, see the judgment of Knox, J., in *Suba Singh* v. *Sarfaraz Kunwar* (1) and the judgment in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2).

Apararka in his commentary (as to which see West and Buhler on Hindu Law, 3rd ed., Vol. I., p. 18) takes the same view. According to him it would seem that the brother's grandson should come in immediately after the brother's son (see Tagore's Law Lectures, 1880, pp. 426, 428). Balam Bhatta does not appear to have dealt with the question specifically.

Nanda Pandita places the brother's grandson just before the paternal grandfather (see Sacred Books, Vol. VII, p. 68, and Tagore Law Lectures, 1880, p. 503).

(1) (1896) I. L. R., 19 All., 215; at pp. 224, 225, 226.

(2) (1870) 13 Moo., I. A., 373.

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It would not be of any use to examine the commentaries which are not accepted as authorities in the Benares school; but, as far as we are aware, one of them only, the Smriti Chandrika, denies the right of the brother's grandson, while all writers of the Bengal school, of course, agree that he comes in immediately after the brother's son, and the Vyavahara Mayukha propounds a doctrine, according to which the parties to the present case might share the inheritance half and half.

Turning to reported cases in the Indian Courts, we find that the earliest case in which the question is mentioned is that of *Sambhoo Dutt Singh* v. *Jhootee Singh* (1). That was a case from Tirhoot, where the Mithila law prevails; but it does not appear that there is any difference between the Mithila and Benares schools on this question. The learned Judges say in their judgment "the right of succession only ascends on failure of brothers, nephews, and grandnephews."

In the case of *Rutcheputty Dutt Iha* v. *Rajunder Narain Rae* (2) Mr. Harrington expressed the opinion that the words in Mitakshara translated "sons" and "issue" in verses 4 and 5 of sec. 5 of chap. II mean sons and other descendants of the sons and grandsons; that this was shown by the words "on failure of the father's descendants" in verse 4, and by the words "on failure of the paternal grandfather's line" in verse 5, and that to adopt the literal and stricter construction would be to cut off all the descendants below the grandson of the father, which would be inconsistent with other provisions of the Mitakshara.

In the case of *Kureem Chand Gurain* v. *Oodung Gurain* (3), Jackson J., quotes the above opinion of Mr. Harrington with approval, and infers that he would have construed "brother's sons" as including brother's grandsons, and proceeds to state his own opinion that the word "sons" in the Mitakshara does, as a general rule, include all descendants in the male line who can offer funeral oblations.

In the case of *Oorhya Kooer* v. *Rajoo Nye* (4), the Court seems to have been of opinion that a brother's grandson was entitled to succeed in preference to the great-grandfather's great-grandson.

(1) S. D. A., L. P., 1855, p. 382.
(2) (1839) 2 Moo., I. A., 133.
(3) (1866) 6 W. R. C. R., 158.
(4) (1870) 14 W. R. C. R., 208.

The question was discussed at length in *Suraya Bhukta* v. *Lakshminarasamma* (1) by Sir Charles Turner, C. J., and Kindersley, J., who held that according to the Hindu law current in the Madras Presidency, a brother's grandson did not exclude a paternal uncle's son. They took the view that the word "sons" in the Mitakshara, chap. II., sec. IV, verse 7, and sec. V, verse 1, should be construed literally and did not include grandsons. The learned Judges considered the opinion of Mr. Harrington quoted above to be an *obiter dictum*. They do not refer to the opinion expressed in the other cases cited above, and they seem to have been influenced to a considerable degree by the writings of commentators, whose works are not, as far as we are aware, accepted as authoritative in these provinces. Some passages in the judgment suggest that, in their opinion, no grandsons of collaterals are entitled to inherit. Such a rule would be inconsistent with the decision of the Privy Council in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2) and *Rutcheputty Dutt Jha* v. *Rajunder Narain Rae* (3) where the successful claimants were respectively fifth and sixth in descent from the common ancestor. Lastly, the judgment of the Madras High Court does not indicate what place should be assigned to the brother's grandsons if they do not come in immediately after brother's sons. Mr. Raj Kumar Sarvadhikari, in his work on the Hindu law, comes to the conclusion that brother's grandsons should come in immediately after the brother's sons and before the paternal grandmother (Tagore Law Lectures, 1880, pp. 648—651). Messrs. West and Buhler, Vol. I., p. 124, 3rd edition, dealing with the question of the order in which *gotraja sapindas* not mentioned by the Mitakshara are to be placed, observed that the principle suggested by Mr. Harrington of continuing each line of heirs down to the seventh person could easily be carried out in the case of the paternal uncle's line and those descended from the sons of remoter ancestors, but that it could not be carried out in the case of the father's line because the brother's grandsons could not be allowed to inherit before the maternal grandmother, whose right to succeed immediately after the brother's sons was

(1) (1881) I. L. R., 5 Mad., 291. (2) (1870) 13 Moo., I. A., 373.
(3) (1889) 2 Moo., I. A., 132.

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KALIAN RAI v. RAM CHANDAR.

clearly settled, and because the brother's grandsons would thereby take precedence of the remoter descendants of the deceased himself, such as the great-grandsons. The learned authors suggest that in order to meet the difficulty the brother's grandsons should either be considered co-heirs with the paternal uncle's son, or placed just before the paternal grandfather.

Shama Charan Sircar in his Vyavastha Chandrika, Vol. I., p. 178, finds a place for brother's grandsons immediately after brother's sons.

It is admitted on all hands that the brother's grandson is a near *sapinda* of the deceased. He is therefore certainly entitled to inherit, and the only question is where he should come in.

Mr. A. C. Mittra and Mr. Golap Chanda Sirkar in their works on the Hindu law express the opinion that the brother's grandsons come in after the grandsons of the great-great-great-great-grandfather of the deceased. Such a reading of the Mitakshara brings about a result completely at variance with its leading principle that the inheritance is to go to the nearest *sapinda*.

Messrs. West and Buhler seem rather to beg the question, where they say that the paternal grandmother must inherit in preference to the brother's grandsons. If the word "sons" and "brother's sons" in the verses last referred to are read as including grandsons, the latter will exclude the paternal grandmother.

Considering that the words "sons" and "issue" in other parts of the same chapter have been read as including "grandsons" and that "grandson" has been interpreted as including great-grandson in order to give effect to the rule that the inheritance shall go to the nearest *sapinda*, and that in other respects the chapters on succession in the Mitakshara have been held to have been intended rather as an outline than as an exhaustive enumeration of heirs, we think that we shall not be doing violence to the text if we follow the opinions of Mr. Harrington and other Judges, and construe the words "sons" and "brother's sons" as including grandsons, But even if that is not permissible, we see no reason why the brother's grandsons should not come in as the first *gotraja sapindas* entitled to succeed after the paternal grandmother under verse 3 of section V.

With regard to Messrs. West and Buhler's objection that this will let the brother's grandsons in before the great-great-grandsons of the deceased, we would observe that according to Mr. Harrington's view a great-great-grandson of the deceased would take immediately after the great-grandson; and even if that view is not correct, the remote descendants of the proprietor might well be regarded as less nearly akin than the grandnephews. (See opinion of Mr. Mayne in his work on Hindu Law, p. 679, 6th edition.) The fact is that it is almost impossible for a single family to contain more than four generations in direct descent, so that it is scarcely necessary to consider the great-great-grandson of the proprietor. We think that the verses of the Mitakshara quoted at the beginning of this judgment show sufficiently clearly that near *sapindas* must be exhausted before the estate can go to remote *sapindas*. It seems to us that whatever test of propinquity be applied, the brother's grandson is a nearer *sapinda* of the deceased than the paternal uncle's son. It may be that the line of each ancestor of the deceased should be continued down to the seventh person; but in the present case it is not necessary to go as far as that. All that we hold is that the father's line, as far down as his great-grandson, must be exhausted before the grandfather or his line can come in. There is also, as shown above, considerable authority for the view that "brother's sons" should be read as "brother's grandsons."

We are of opinion that no ground has been shown for disturbing the decree of the lower appellate Court, and we therefore dismiss this appeal with costs.

Appeal dismissed.

1901
August 17.

Before the Hon'ble Mr. Chief Justice Stanley, and Mr. Justice Burkitt.

JHAMMAN LAL (DECREE-HOLDER) v. HIMANCHAL SINGH (JUDGMENT-DEBTOR).*

Act No. XIX of 1873 *(N.-W. P. Land Revenue Act), section* 205*B—Attachment of property of disqualified proprietor—Profits accruing after the release of the* corpus *by the Court of Wards.*

Held that the prohibition contained in the second paragraph of section 205B of Act No. XIX of 1873 does not apply to the rents and profits of property which may accrue after the release of the *corpus* from the superintendence of the Court of Wards. *Himanchal Singh* v. *Jhamman Lal* (1) referred to.

THIS appeal arose out of certain proceedings for the execution of a decree against the respondent. The appellant obtained a decree against the respondent on the 14th of July 1898, at which time the property of the respondent was under the superintendence of the Court of Wards. In September 1899 the respondent's property was released by the Court of Wards. Subsequently to the release of the respondent's property the appellant attempted to execute his decree against such property and against certain profits which had accrued while the property was under superintendence, but in this he was defeated.—See *Himmanchal Singh* v. *Jhamman Lal* (1). The appellant next sought execution of his decree by realization of certain profits of the respondent's property which had been attached in pursuance of a former application for execution, but not released from attachment at the time when the attachment of the corpus of the property and of other profits had been raised. The judgment-debtor applied to the Court executing the decree praying that the attachment on these profits also should be raised. In reply the decree-holder sought to differentiate the present claim from his former unsuccessful claims against the property of the judgment-debtor on the ground, which was admitted to be based on fact, that the profits which were then sought to be taken in execution had accrued due since the release of the corpus of the property from the superintendence of the Court of Wards. The Court executing the decree (Subordinate Judge of Mainpuri), however, gave effect

* First Appeal No. 182 of 1900, from a decree of Pandit Rajnath Saheb, Subordinate Judge of Mainpuri, dated the 14th July, 1900.

(1) (1900) I. L. R., 22 All., 364.

to the judgment-debtor's application and refused execution. Against this order the decree-holder appealed to the High Court.

Mr. *Amir-ud-din*, Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

Pandit *Moti Lal* and Munshi *Gulzari Lal*, for the respondent.

STANLEY, C. J. and BURKITT, J.—This appeal raises a very nice question upon the true construction and meaning of s. 205B of the N.-W. P. Land Revenue Act. The property of the defendant at the time when the plaintiff obtained a decree against him on the 14th July, 1898, was under the superintendence of the Court of Wards. In September, 1899, this property was released by the Court of Wards. Subsequently the rents and profits of this and other shares in the property were collected by the Court of Wards, and in the year 1307 Fasli certain profits were collected which belong or are alleged to belong to the judgment-debtor. These accrued due after the release of his share of the property from superintendence, and it is contended by the decree-holder that he is entitled now to attach such rents and profits. On the part of the defendant it is contended that this case is governed by a decision of this Court in *Himanchal Singh* v. *Jhamman Lal* (1) between the same parties. In that case it was decided that the judgment-debtor could not attach rents and profits of property which had been under the superintendence of the Court of Wards at the time the decree was obtained, and which represented rents and profits, that is, the rents and profits which accrued before the property was released from superintendence. In the present case it will be observed that the rents and profits accrued after the property had been released from superintendence. Examining the section of the Act, it appears to us that the only property which is pointed at in the section as being exempted from attachment is property actually under the superintendence of the Court of Wards, and does not include property such as rents and profits which accrue after the release of the corpus from superintendence. We may observe that the question is far from being free from doubt; but we think that if the Legislature intended to

(1) (1900) I. L. R., 22 All., 364.

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apply the section to a case of this kind the words should have been wider, and should have included not merely property or any part of property, but also "rent and profits" of the property. For these reasons we are of opinion that the Court below is wrong in its decision and that the appeal should be granted.

It must be understood that our judgment is not to be taken as entitling the appellant to obtain payment from the Collector without a suit if the Collector contests the matter.

Appeal decreed.

1897
January 13.

Before Sir John Edge, Knight, Chief Justice, and Mr. Justice Blair.

BEHARI LAL AND ANOTHER (DECREE-HOLDER) *v.* MAJID ALI (JUDGMENT-DEBTOR).*

Execution of decree—Principle of res judicata as applied to execution proceedings—Succession certificate—Act No. VII of 1889 *(Succession certificate Act), section* 4.

The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which, in that suit or in the execution proceedings in that suit, had been previously determined.

The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. *Ram Kirpal* v. *Rup Kuari* (1) referred to.

ONE Gauri Shankar obtained a decree for money against Majid Ali. Gauri Shankar having died, one Behari Lal, alleging himself to be a brother of Gauri Shankar, and one Musammat Sonkali, alleging herself to be the widow of a deceased brother of Gauri Shankar, applied for execution. No decision was come to on that application, but it was struck off under circumstances which did not make the striking off a dismissal. After this Behari Lal and Sonkali again applied for execution by arrest of the judgment-debtor. Notice of that application was apparently

* Second Appeal No. 1049 of 1894, from an order of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 7th June 1894.

(1) (1883) I. L. R., 6 All., 269.

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served, but Majid Ali made no appearance, and a warrant of arrest was issued against him in his absence. This warrant was, however, never executed, and the application for execution proved infructuous. A third application for execution was presented by Behari Lal and Musammat Sonkali making the same allegations of their relationship or connection with Gauri Shankar, and again praying for the arrest of Majid Ali. On this occasion Majid Ali did appear and objected to the right of Behari Lal and Sonkali to have execution of the decree. The objections were that neither of them was a member with Gauri Shankar of a joint Hindu family; that Behari Lal had been born deaf and dumb, and, even if he was a brother of Gauri Shankar, no rights had devolved upon him, and that under section 4 of Act No. VII of 1889 the Court could not proceed upon the application for execution except upon the production by the applicants of probate or letters of administration or of one of the certificates referred to in that section. The first Court disallowed the objections and made an order for execution. The judgment-debtor appealed, and the lower appellate Court (District Judge of Gorakhpur) reversed the order of the Court of first instance and dismissed the application for execution. That Court held that Behari Lal was not a member of a joint family with Gauri Shankar, and that neither he nor Musammat Sonkali was entitled to have execution of the decree, and further that the objection under section 4 of Act No. VII of 1889 was a good one. Against this order the decree-holders appealed to the High Court.

Mr. *Abdul Majid*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C. J., and BLAIR, J.—Gauri Shankar obtained a decree for money against Majid Ali. Gauri Shankar died, and one Behari Lal, alleging himself to be a brother of Gauri Shankar, and one Musammat Sonkali, alleging herself to be the widow of a deceased brother of Gauri Shankar, applied for execution. No decision was come to on that application, but it was struck off under circumstances which did not make the striking off of the application a dismissal. Afterwards Behari Lal and Musammat Sonkali, making the same allegations of relationship or

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connection with Gauri Shankar, applied for execution of the decree by arrest of Majid Ali. Notice was issued to Majid Ali under section 248 of the Code of Civil Procedure. It has been proved that that notice was served, and indeed, as the Court proceeded to adjudicate on the application, it must be presumed, until the contrary is shown, that the Court was satisfied by proper evidence that the notice had been served. Majid Ali did not appear. On that second application the Court made an order for the issue of a writ for the arrest of Majid Ali. Majid Ali could not then be found, and the warrant was never executed, and the application was infructuous. Subsequently, on the 2nd of August, 1893, Behari Lal and Musammat Sonkali, making the same allegations of their relationship or connection with Gauri Shankar, presented another application for execution of the decree by the arrest of Majid Ali. On this occasion Majid Ali did appear and objected to the right of Behari Lal and Sonkali to have execution of the decree. The objections were that neither of them was a member with Gauri Shankar of a joint Hindu family; that Behari Lal had been born deaf and dumb, and, even if he was a brother of Gauri Shankar, no rights had devolved on him, and that under section 4 of Act No. VII of 1889, the Court could not proceed upon the application for execution except upon the production by the applicants of probate or letters of administration or of one of the certificates referred to in that section. The first Court disallowed the objection and made an order for execution. The second Court held that Behari Lal was not a member of a joint family with Gauri Shankar, and that neither he nor Musammat Sonkali was entitled to have execution of the decree, and further that the objection under section 4 of Act No. VII of 1889 was a good one, and allowing the objections dismissed the application.

Of course it is obvious that, whether Musammat Sonkali's husband died before or after Gauri Shankar died, she was in no sense a co-parcener of Gauri Shankar, and in that sense not a member of a joint Hindu family conjointly with him; and that if she was a representative entitled to have the decree executed, section 4 of Act No. VII of 1889 would apply in her case.

As to Behari Lal, the question appears to turn upon what would be the effect of the second application and the order for execution issued thereon. Section 13 of the Code of Civil Procedure of course in terms does not apply to a case of this kind, but, as has been pointed out by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1) the principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings an issue which, in that suit or in the execution proceedings in the suit, had been previously determined. Now Majid Ali had an opportunity to come before the Court on the second application and to raise these very objections. We must presume, as the Court made an order for the issue of a warrant on that second application, that the Court rightly or wrongly did decide and determine the question as to the right of Behari Lal and Musammat Sonkali to have execution of the decree obtained by Gauri Shankar. We must presume that the Court followed the procedure indicated by the Code of Civil Procedure in cases in which a defendant does not appear, and, as it made an order in favour of the applicants, it is to be presumed that the Court was satisfied by evidence that these applicants were representatives of Gauri Shankar entitled to execute his decree. It is immaterial for present purposes whether or not the Court came to a wrong decision on that point. We think the decision probably was wrong, but we cannot decide the question. It is obvious that the principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. The defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit. The plaintiff who has got an *ex parte* decree on proof of his title, or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. In such cases the plaintiff could not sue again on the same cause of action, and it would be a curious

(1) (1883) I. L. R., 6 All., 269.

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principle of law which would preclude the plaintiff from suing again on his cause of action, but would leave it open to the defendant to raise in any subsequent litigation between himself and the plaintiff the issues which must necessarily have been decided explicitly or implicitly to have entitled the plaintiff to the decree which he had obtained *ex parte*. Under these circumstances we hold that the effect of the adjudication and order passed upon the second application for execution was that Majid Ali cannot now dispute the right and competence of Behari Lal and Musammat Sonkali to have execution of the decree as representatives of Gauri Shankar. That, in our opinion, is the necessary result of the principle of *res judicata* as applied to this case.

But the principle of *res judicata* has no effect upon the provisions of section 4 of Act No. VII of 1889. That section prohibits a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled, to the effects of the deceased person or any part thereof, or from proceeding upon the application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except upon production of one or other of the documents specified in the section. It imposes a duty on the Court which the Court is bound to perform, no matter what the proceedings between the parties, or any agreement between the parties, may be. All that is clear in this case is that it cannot now be questioned that Behari Lal and Musammat Sonkali, as between them and Majid Ali, are entitled to have execution of the decree, of course subject to the provisions of section 4 of Act No. VII of 1889. Whatever title the Court may have assumed that they had, it is obvious that Musammat Sonkali, at any rate, was not a member of the same joint family as Gauri Shankar. The Court below ought, instead of dismissing the application for execution, to have given reasonable time to the applicants to perfect their title by the production of one or other of the documents specified in section 4 of Act No. VII of 1889. We set aside the decree of the Court below and remand this case to that Court under section 562 of the Code of Civil Procedure to be disposed of according to law. We allow the appeal, but without costs.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

1901
August 15.

Before Mr. Justice Banerji.

KING-EMPEROR *v.* KALIJI *alias* KALI SINGH AND OTHERS.*

Act No. XLV of 1860 *(Indian Penal Code), section* 147—*Riot—Private defence of property—Act No. XLV of* 1860 *(Indian Penal Code), sections* 96 *et seq—Deliberate aggression by party entitled to possession.*

Party *A* sowed a crop in a field to the possession of which apparently they were entitled. Party *B* claiming the field and the crop as theirs, entered upon the land and began to cut the crop. Party *A*, having watched party *B* enter upon the land took counsel together and then proceeded to attack party *B*, and a fight ensued in which grievous hurt was caused. *Held* that it was not open to party *A* to plead that they were acting in the exercise of their right of private defence of property. *Queen-Empress* v. *Prag Dat* (1) followed. *Queen-Empress* v. *Narsang Pathabhai* (2) distinguished. *Pachkauri* v. *Queen-Empress* (3) not followed.

THE applicants in this case were convicted by a Magistrate of the first class of rioting and causing grievous hurt and sentenced to six months' rigorous imprisonment each, and the convictions and sentences were affirmed on appeal by the Sessions Judge. The cause of the riot was a piece of land, formerly occupied by a grove, but which at the time of the dispute had been cleared and planted with sugarcane. The owner of the land was one Bhuneshar Singh, who was a minor under the guardianship of two ladies, Musammat Rekha and Musammat Ram Piari. The applicants were servants of the ladies, and the opposite parties in the riot were certain persons who claimed to be cultivators of the land on behalf of the zamindars. On the 27th of January, 1901, the party of Ram Ghulam Singh came to the land and began to cut the sugarcane. The applicants, who seem to have made up their minds to take this opportunity of attacking their opponents, watched Ram Ghulam Singh's party commence to cut the cane, and then retired to a neighbouring karkhana, whence, after holding a consultation, they issued and attacked the persons who were engaged in cutting the cane. A riot ensued in the course of which one man was injured severely and another less seriously. Before the trying Magistrate the plea of

* Criminal Revision No. 475 of 1901.

(1) (1898) I. L. R., 20 All., 459. (2) (1890) I. L. R., 14 Bom., 441
(3) (1897) I. L. R., 24 Calc., 686.

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self-defence was raised on behalf of the present applicants, but without success, the Magistrate finding that the applicants' party had resolved beforehand to make an assault under the pretence of cutting the sugarcane, that they had gathered together at a karkhana under the leadership of Kali Singh, and that after holding a consultation they proceeded to the spot, where Ram Ghulam Singh's party were cutting the crops, and there a fight took place. The applicants having appealed to the Sessions Judge and their appeal having been dismissed, applied to the High Court in revision, again urging that in acting as they had they were acting in the exercise of their right of private defence.

Mr. *Amir-ud-din*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BANERJI, J.—The applicants have been convicted under sections 147 and 325, I. P. C. It appears that a plot of land No. 266 had a grove on it which belonged to one Bhuneshar Singh, a minor, under the guardianship of two ladies, Musammat Rekha and Musammat Ram Piari. It has been found that the land was sown with sugarcane on behalf of the ladies in the year 1308F., that Ram Ghulam Singh and others claimed to be the cultivators of that land on behalf of the zamindars, and that consequently a dispute arose between the party of the ladies and the party of Ram Ghulam Singh. The applicants are the servants of the ladies. On the 27th of January, 1901, the party of Ram Ghulam Singh came to the land and began cutting the sugarcane crop. The applicants, who were headed by Kali Singh, resisted Ram Ghulam Singh's party, and a lathi fight took place, in which two persons sustained grievous hurt. The applicants have been convicted of the offence of rioting in consequence of the part taken by them in the fight. It is urged on their behalf that they were exercising their right of private defence, and that consequently they were not guilty of any offence. On the finding of the Magistrate, which has been approved of and affirmed by the Sessions Judge, and having regard to the rulings of this Court, this contention must fail. The Magistrate has found that the applicants' party had resolved beforehand to make an assault under the pretence of cutting the

sugarcane, that they had gathered together at a karkhana under the leadership of Kali Singh, and that after holding a consultation they proceeded to the spot where Ram Ghulam Singh's party was cutting the crops, and there a fight took place. It was held in *Queen-Empress* v. *Prag Dat* (1), that "when a body of men are determined to vindicate their rights, or supposed rights, by unlawful force, and when they engage with men who, on the other hand, are equally determined to vindicate by unlawful force their rights, or supposed rights, no question of self-defence arises." That ruling fully applies to this case, and having regard to it the plea of self-defence cannot be sustained. The learned counsel for the applicants referred to the ruling of the Bombay High Court in *Queen-Empress* v. *Narsang Pathabhai* (2). That case is, in my opinion, distinguishable, as it was decided with reference to its own peculiar circumstances, which were different from those of the present case. The ruling of the Calcutta High Court in *Pachkauri* v. *Queen-Empress* (3), upon which the learned counsel relies, no doubt supports his contention. There it was held that where a body of men who were rightfully in possession found it necessary to protect themselves from aggression on the part of the complainant's party, they were justified in taking such precautions as they thought were required and in so doing they could not be held to be members of an unlawful assembly. The view taken in that case is not in accord with that adopted in the ruling of this Court to which I have referred above, and I think I should follow the latter ruling. As the plea of self-defence fails the application must be dismissed. I see no reason to interfere with the sentence.

(1) (1898) I. L. R., 20 All., 459. (2) (1890) I. L. R., 14 Bom., 441.
(3) (1897) I. L. R., 24 Calc., 686.

1901
July 6.

APPELLATE CIVIL.

Before Mr. Justice Aikman.

IDU MIAN (PLAINTIFF) *v.* RAHMAT-ULLAH (DEFENDANT).*

Act No. XV of 1877 *(Indian Limitation Act), Sch. ii, arts.* 29 *and* 42—*Limitation—Suit for compensation for wrongful seizure of movable property under legal process—Suit for compensation for injury caused by an injunction wrongfully obtained.*

The defendant on the 18th of February, 1898, attached in execution of his decree certain country soap as being the property of his judgment-debtor. The plaintiff intervened claiming the soap as his, and his objection was allowed. The defendant thereupon instituted a suit under section 283 of the Code of Civil Procedure for declaration of the title of his judgment-debtor, but was defeated, and his appeal in that suit was dismissed on the 23rd of March, 1899. At the time of the institution of this suit the defendant applied for and obtained an injunction directing that the soap should not be made over to the plaintiff. Ultimately the plaintiff, on the 17th of June, 1899, after the dismissal of the defendant's appeal, obtained possession of the soap. He then sued the defendant to recover damages for the loss of part and the deterioration of the rest of the soap while under the defendant's attachment. *Held* that article 42, and not article 29 of the second schedule to the Indian Limitation Act, 1877, applied, and that the suit was not barred by limitation.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Ishaq Khan* for the appellant.

Mr. *Amir-ud-din* for the respondent.

AIKMAN, J.—The following are the facts out of which this suit has arisen. The respondent, Sheikh Rahmat-ullah, held a decree against one Ghurbin, in execution of which, on the 18th of February, 1898, he attached upwards of twenty maunds of native soap as the property of his judgment-debtor. Idu Mian, the plaintiff in this case, intervened and claimed the soap as his own. His objection was sustained, and the soap was ordered to be released from attachment. Sheikh Rahmat-ullah immediately instituted a suit under section 283 of the Code of Civil Procedure, to have it declared that the soap was the property of his judgment-debtor, Ghurbin. This suit was instituted on the 10th of August, 1898. On the same day Sheikh Rahmat-ullah put in an application to the Court, asking that the order for the

* Second Appeal No. 742 of 1900, from a decree of Rai Anant Ram, Subordinate Judge of Ghazipur, dated the 26th April, 1900, reversing a decree of Babu Chandi Prasad, Munsif of Rasra, dated the 30th January 1900.

release of the soap in Idu Mian's favour should not be carried out, and that the soap should be retained in the possession of the person to whom it had been made over until the decision of the suit which he (Rahmat-ullah) had instituted. The Munsif granted this application. In the result the suit of Rahmat-ullah under section 283 was dismissed on the 21st of December, 1898, and that decision was affirmed on appeal on the 23rd of March, 1899. The result of this litigation, therefore, shows that the attachment of the plaintiff's soap by the respondent, Rahmat-ullah, was wrongful. It is admitted that Idu Mian did not get back his soap until the 17th of June, 1899. The plaintiff states that when he got it back, he found that it was not only diminished in quantity, but greatly deteriorated in quality. He accordingly sues to recover Rs. 273-11-0 for damages caused by this wrongful attachment. The defendant denies that the plaintiff has suffered any damage. The Court of first instance gave the plaintiff a decree, assessing the damage at Rs. 113-12-0. Both parties appealed. On appeal the learned Subordinate Judge dismissed the suit, holding that it was barred by the provisions of article 29 of schedule ii of the Indian Limitation Act, which provides a period of one year's limitation running from the date of the seizure for a suit for compensation for wrongful seizure of movable property under legal process. The plaintiff comes here in second appeal. It is argued that the case is one which falls properly under article 42 of schedule ii of the Limitation Act, which provides a period of three years' limitation for a suit for compensation for injury caused by an injunction wrongfully obtained, the time beginning to run from the date when the injunction ceases. It appears to me that it would be unjust to apply the provisions of article 29 to a suit of this nature when the plaintiff got back his property upwards of a year after the date of the seizure. Until he recovered his property, it was impossible for him to say whether the property had or had not been damaged. Again, the length of time during which the plaintiff is kept out of his property is an element in assessing the damage. This consideration leads me to think that article 42 should be applied to this case. It was owing to the action of the defendant that an injunction was issued by the Court which prevented the order for the release of

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the property in the plaintiff's favour being carried out. The facts of this case are similar to those in the case of *Haji Pir Muhammad* v. *Thakur Das* decided by the Chief Court of the Panjab on the 2nd of February, 1881—*vide* number 40 of the Civil Judgments of 1881. The learned Judges there held that the continuance of the attachment under the order of the Court must be treated as an injunction under section 492 of the Code of Civil Procedure, and an injunction wrongfully obtained by the defendant. They accordingly applied article 42 to the case. It is quite true that the plaint in this case has not been artistically framed. Still it clearly sets forth the wrongful attachment of the soap, and alleges that "the defendant by means of continued litigation did not allow it to be released for sixteen months." As stated above, it was not until the date of the release that the plaintiff was in a position to estimate the damage which he had suffered. He instituted his suit within a little more than three months from the date of the release, and within six months of the date of the final dismissal of the defendant's suit under section 283. This being so, it appears to me impossible to hold that the plaintiff's suit was out of time. I allow the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure for disposal of the remaining grounds raised in the memorandum of appeal to it. The plaintiff will have the costs of this appeal in any event. The other costs will abide the result.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

1901, *October* 1.

Before Mr. Justice Knox.

KING-EMPEROR *v.* FYAZ-UD-DIN.*

Criminal Procedure Code, sections 110 *et seqq. and* 437*—Security for good behaviour—Power of District Magistrate to reopen proceedings on the same record after the discharge of the person called upon to show cause by a Magistrate of the first class.*

Held that it is competent to the Magistrate of the District, in the case of a person who has been called upon, under section 110 of the Code of Criminal

* Criminal Revision No. 659 of 1901.

Procedure, by a Magistrate of the first class, to show cause why he should not furnish security for good behaviour, and has been discharged by such Magistrate under section 119 of the Code, to institute fresh proceedings against such person upon the basis of the record that was before the first class Magistrate. *Queen-Empress* v. *Mutasaddi Lal* (1), *Queen-Empress* v. *Ratti* (2), *Queen-Empress* v. *Ahmad Khan* (3), and *Queen-Empress* v. *Iman Mondal* (4) referred to.

THE facts of this case sufficiently appear from the order of the Court.

Mr. *A. H. S. Hamilton* for the applicant.

KNOX, J.—This is an application by one Fyaz-ud-din, asking this Court to revise an order passed by the District Magistrate of Bijnor. That order is dated the 2nd of September, 1901. It appears that the District Magistrate of Bijnor had before him certain proceedings which had taken place in the Court of Pandit Bisheshwar Dayal, a Magistrate of the first class. Those proceedings were proceedings under section 110 of the Criminal Procedure Code. Pandit Bisheshwar Dayal, after hearing the evidence on both sides, came to the conclusion that there were not, in his opinion, sufficient grounds, for the present at least, to bind over Fyaz-ud-din to be of good behaviour; and he accordingly discharged him under section 119 of the Code of Criminal Procedure.

The District Magistrate of Bijnor, after looking through the record, instituted fresh proceedings after framing a fresh order under section 112. He did not profess to make the order under section 437 of the Criminal Procedure Code, but in the application before me it is contended that his order must have been made under that section. It is now contended that the District Magistrate cannot institute fresh proceedings in the absence of fresh information. The learned counsel for the applicant drew my attention to the case of *Queen-Empress* v. *Iman Mondal*, (4). In that case, according to the judgment, the order for inquiry purported to have been made under section 437 of the Code of Criminal Procedure; so that in this respect it differed from the case with which I have now to deal. The learned Judges who decided that case have laid down that proceedings under section 110 of the Code of Criminal Procedure cannot be

(1) (1898) I. L. R., 21 All., 107.
(2) Weekly Notes, 1899, p. 203.
(3) Weekly Notes, 1900, p. 206.
(4) (1900) I. L. R., 27 Calc., 662

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regarded as on a complaint, nor can they be regarded as a case in which an accused person has been discharged. But the important part in that judgment, so far as this case is concerned, was the final paragraph, in which, after setting aside the order, they added—"if it be considered by the Magistrate that it is necessary to institute further proceedings, he is competent to do so under the law on fresh information received." So far the contention of the learned counsel, that further proceedings under section 110, when the first proceedings have come to an end, cannot be instituted except on fresh information received, is justified. In the present case the Magistrate of the District acted only upon the record of the previous proceedings, so that he cannot be said to have acted on fresh information so far as the present proceedings were concerned. The case above cited has been followed by this Court in the case of *Queen-Empress* v. *Ahmad Khan* (1). Here, too, the order reported to this Court was an order purporting to have been made under section 437 of the Code of Criminal Procedure, and it was held that that order was passed without jurisdiction.

On the other hand, this Court has held in *Queen-Empress* v. *Mutasaddi Lal* (2), and again in *Queen-Empress* v. *Ratti* (3), that proceedings of this kind are proceedings which are covered by section 437 of the Criminal Procedure Code. So far as I am concerned, it appears to me that the words "into the case of any accused person who has been discharged," which are used in section 437, are, with all due respect to those who have held otherwise, wide enough to cover cases falling under Chapter VIII (B). If those words do not cover proceedings under Chapter VIII(B), then I know of no provision of the law, or any principle of law, which would stand between a Magistrate instituting fresh proceedings, even if he was acting upon precisely the same facts and precisely the same information. I wish to guard myself against being understood to hold that I consider that such proceedings should be instituted lightly, or that a Magistrate should not enter upon them without very great care and caution. In the present instance the District Magistrate of

(1) Weekly Notes, 1900, p. 206. (2) (1898) I. L. R., 21 All., 107.
(3) Weekly Notes, 1899, p. 203.

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KING-EMPEROR v. FYAZ-UD-DIN.

Bijnor certainly looked into the case, and apparently carefully. He came to the conclusion that more convincing proof of bad livelihood of the worst description could not be adduced. He accordingly, as Magistrate of the District, instituted fresh proceedings under section 110; and he did not purport to act under section 437 of the Criminal Procedure Code. He evidently looks upon the record as information sufficient to justify his taking action. He took fresh evidence. I have been asked to refer the case to two Judges in order that there may be an authoritative decision upon the point. I do not, however, think it necessary to delay passing orders. Even if the District Magistrate should require security, his proceedings can, if they are proceedings held without jurisdiction, be afterwards set aside. I do not for one moment go into the evidence one way or the other, but it is easy to conceive that a man who is a terror to the neighbourhood might work a good deal of mischief while or until this case could be decided; and up to the present, with the exception of one reported case of *Queen-Empress* v. *Ahmad Khan*, so far as I know, his power to do so has never been questioned in this Court. As I have shown in *Queen-Empress* v. *Ahmad Khan*, the Magistrate purported to act under section 437. In this case the Magistrate does not profess to have so acted.

I dismiss the application.

Before Mr. Justice Aikman.

1901
November 4.

KING-EMPEROR *v.* MUNNA.*

Criminal Procedure Code, sections 107(2), 192—*Security for keeping the peace—Transfer—Power of District Magistrate to transfer proceedings instituted by him against a person not within his district.*

Held that it was competent to a District Magistrate who had initiated proceedings under section 107(2) of the Code of Criminal Procedure against a person not at the time within the limits of his jurisdiction to transfer such proceedings at a later stage to a Magistrate subordinate to himself, though such Magistrate was not competent to initiate such proceedings.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Gorakhpur, arising out of the following facts. One Munna Tiwari, a resident of the Gorakhpur district, had been called upon by the District

*Criminal Reference No. 771 of 1901.

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Magistrate of Basti, acting under section 107, clause (2) of the Code of Criminal Procedure, to show cause why he should not furnish security to keep the peace. After proceedings had been thus instituted by the District Magistrate of Basti, he, professing to act under section 192 of the Code, transferred those proceedings to one of his subordinates, a Magistrate of the first class, who completed them, making an order for security against Munna Tiwari. On an application for revision of this order, the Sessions Judge of Gorakhpur, being of opinion that such proceedings initiated under the circumstances above described could not be transferred, submitted the record to the High Court for orders.

AIKMAN, J.—In this case one Munna Tewari was called on to furnish security for keeping the peace. It appears that he is a resident of the Gorakhpur district. Proceedings were taken against him by the District Magistrate of Basti under the provisions of section 107, sub-section (2) of the Code of Criminal Procedure, he not being then within the local limits of that Magistrate's jurisdiction. After taking proceedings under that section the District Magistrate, professing to act under the provisions of section 192 of the Code of Criminal Procedure, transferred the case of which he had thus taken cognizance to a Magistrate of the first class subordinate to him, who passed the order for security. In the referring letter of the learned Sessions Judge the question is raised as to whether the District Magistrate, after instituting proceedings under section 107 (2), had any power to transfer the case. This question is not altogether free from difficulty. But after consideration, I am of opinion that the intention of the Legislature was to limit the jurisdiction in regard to institution of proceedings in cases like the present to a Chief Presidency or District Magistrate; but that when such Magistrate has, in the exercise of his discretion, directed institution of proceedings, there is nothing in the law to prevent him from transferring the case to a Magistrate otherwise qualified to complete the proceedings. In this case it appears that a previous application for revision had been made to the District Magistrate. The learned Sessions Judge ought therefore, with reference to the provisions of section 435, sub-section (4), to have referred the applicant to this Court. As, however,

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the proceeding has come to my knowledge, I have dealt with it under section 439, sub-section (1) of the Code of Criminal Procedure. For the reasons set forth above I am of opinion that the Magistrate of the first class had jurisdiction to make the order which he did, and I direct that the record be returned.

APPELLATE CIVIL.

1901
November 7.

Before Mr. Justice Knox and Mr. Justice Blair.

NIADAR (DEFENDANT) *v.* BARU MAL AND OTHERS (PLAINTIFFS).*

Act No. XII of 1881 (*N.-W. P. Rent Act*), *sections* 93, 95—*Act No. XIX of* 1873 (*N.-W. P. Land Revenue Act*), *section* 102—*Jurisdiction—Civil and Revenue Courts—Suit to eject as a trespasser a person who claimed to be entitled to the holding of a deceased occupancy tenant—Res judicata.*

Upon the death of an occupancy tenant, a person who alleged that he was entitled to succeed to the deceased's occupancy holding, obtained from the revenue authorities, by means of an application under section 102 of the N.-W. P. Land Revenue Act, mutation of names in his favour, and also got into possession of the holding. The zamindars thereupon brought a suit in a Civil Court for his ejectment, on the allegation that he was a mere trespasser, who had no right whatever to succeed to the holding of their late occupancy tenant. *Held* that such suit was properly brought in a Civil Court, and could not have been instituted in a Court of Revenue, and the decision of the Revenue authorities allowing mutation of names in the defendant's favour could not operate as *res judicata* in respect of such suit. *Subarni v. Bhagwan Khan* (1) distinguished.

THE facts out of which this appeal arose were as follows. One Gulzara, an occupancy tenant, died in November 1899. Thereupon Niadar, the present appellant, applied to the revenue authorities under section 102 of Act No. XIX of 1873 for the entry of his name in respect of Gulzara's occupancy holding. An order was made for the entry of Niadar's name on the 11th of February, 1900, and he obtained possession of the holding. Upon this the zamindars brought a suit in the Civil Court to eject Niadar and recover possession of the holding on the ground that Niadar was a mere trespasser who had no right whatever to the land as the successor of Gulzara. The Court of first instance dismissed the suit, holding that it was not cognizable by a Civil

* Appeal No. 17 of 1901 under section 10 of the Letters Patent.

(1) (1896) I. L. R., 19 All., 101.

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Court, and the plaintiffs' appeal was dismissed by the lower appellate court on the same ground. The plaintiffs appealed to the High Court, and their appeal, coming before a single Judge of the Court, was decreed. (See I. L. R., 23 All., 360.) From this judgment the defendant appealed under section 10 of the Letters Patent.

Babu *Satya Chandar Mukerji*, for the appellant.

Pandit *Sundar Lal*, for the respondents.

KNOX and BLAIR, JJ.—The point which has been contended, and very earnestly contended, before us by the learned vakil for the appellant, is whether the suit out of which this appeal has arisen is, or is not, one governed by the precedent of *Subarni* v. *Bhagwan Khan* (1).

We agree with our brother Banerji that the present suit was not one governed by that precedent. In the present suit the application originally made to the Revenue Courts was an application on plain paper, headed and marked as being one under section 102 of Act No. XIX of 1873. No person was cited as a defendant: all that the application stated was, that the applicant had been in joint occupancy of an occupancy holding together with the deceased; that he had succeeded to the holding, and was in possession of it; that the patwari had wrongly refused to report the case for mutation of names, and prayed that mutation of names might be effected in his favour. There was, as is usual in these cases, a fringe of irrelevant matter tending to obscure the point in issue. The Revenue Court, however, dealt with it as an application under section 102, and passed its order under section 102. There was not, as in the case of *Subarni* v. *Bhagwan Khan*, any request to be put in possession of the occupancy holding: the law has not made any provision, as the learned vakil rightly admitted, whereby orders passed under section 102 of Act No. XIX of 1873 can be treated as judgments of a Civil Court. The case before us differs thus *toto cœlo* from the case of *Subarni* v. *Bhagwan Khan*.

We dismiss this appeal with costs.

Appeal dismissed.

(1) (1896) I. L. R., 19 All., 101.

REVISIONAL CRIMINAL.

1901
November 15.

Before Mr. Justice Blair.

KING-EMPEROR *v.* MOTI LAL AND ANOTHER.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 426, 298, 504—*Mischief—Wilful pollution of food served at a caste dinner.*

Certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and, after telling those who were seated to move to another place, which they refused to do, threw down a shoe amongst the men who were seated. The persons who threw the shoe were convicted of mischief, on the ground that their action had polluted the food, and had, from a Hindu religious point of view, rendered it unfit to be eaten. On reference by the Sessions Judge, it was *held* that this conviction was wrong; neither could the accused be convicted under section 298 or under section 504 of the Indian Penal Code on the facts found.

THIS was a reference under section 428 of the Code of Civil Procedure made by the Sessions Judge of Benares. The facts of the case were as follows. A member of the Mallah caste was giving a feast to the brotherhood. After certain religious ceremonies had been performed and the Brahmans had been fed, the members of the caste were sitting down to take their food. Some of the party had already taken their seats and food had been served to them, when two Mallahs, Moti Lal and Bachcha, appeared on the scene. They first asked the people who were seated to get up and move elsewhere, and when they declined to do so, Moti Lal and Bachcha threw down a shoe on the ground in front of the persons who were about to eat. This action made the food which had been served impure; the guests refused to eat it, and the party broke up in confusion. Moti Lal and Bachcha were tried by a Magistrate and convicted of the offence of mischief punishable under section 426 of the Indian Penal Code. The Magistrate imposed a fine of Rs. 40. The convicts applied in revision to the Sessions Judge, who, being of opinion that section 426 did not apply to the case, reported the case to the High Court for orders.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—Moti Lal Mallah and Bachcha Mallah have been convicted by a Magistrate of an offence under section 426 of the Indian Penal Code, and sentenced to a fine of Rs. 40 each, or in default to be imprisoned for one and a half months. The

* Criminal Reference No. 765 of 1901.

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KING-EMPEROR v. MOTI LAL.

matter came in revision before the Sessions Judge, and he was of opinion that the facts disclosed no offence within the meaning of section 426. The facts, as found, are, that at a certain feast, which had been preluded by recitals from some religious books, after such recitals, the Brahmans having first taken their food, a number of persons of the same caste as the persons who have been convicted, took their seats to the south—whether south of a room or courtyard does not appear. That for some reason unexplained, Moti Lal Mallah and Bachcha Mallah wanted the persons who were seated to move from the south to the north. They refused to do so—the refusal likewise is unexplained. The food which was going to be eaten was on the spot, and the two persons convicted threw a shoe on the adjacent ground, the effect of which would be to render the food impure from the point of view of Hindus of the caste of the persons who were there assembled. They were thus, on account of their conscientious scruples, unable to eat it. It is quite manifest that section 426 can have no application to this state of facts. It deals only with a physical injury from a physical cause. It has been suggested by Mr. *Porter* that the case may fall within one of two other sections. The first is section 298, which renders punishable the uttering of words or sounds, or making gestures, or the placing of any object with the intention of wounding the religious feelings of any person. In my opinion this case is outside the scope and tenour of section 298. My attention has been called to the possibility that the facts of this case may fall within the purview of section 504. That section refers to an insult intentionally inflicted, and which was likely to result in a breach of peace. I doubt very greatly whether the intent here was an intent to insult. It was an intent to deprive these persons of an expected feast, and the insult, if any, would have been incidental and not intentional. However, these persons who have been convicted have not been charged under section 504, and I have no materials before me on which I could find that the facts fell within the provisions of that section. I therefore set aside the sentence under section 426, and order that the fines, if paid, be returned, and if the accused have been confined, that they be at once released.

APPELLATE CIVIL.

1901
November 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

GOBIND PRASAD (PLAINTIFF) *v.* MOHAN LAL (DEFENDANT).*

Possession—Nature of interest in immovable property acquired by virtue of mere possession.

A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable. *Asher* v. *Whitlock* (1), *Sundar* v. *Parbati* (2) and *Brindaban Chunder Rao* v. *Tara Chand Banerjee* (3) referred to.

IN the suit out of which this appeal arose the plaintiff claimed possession of a house situated in the city of Benares. He claimed the property as heir of one Balkishan, the son of Bindraban, who died on the 6th July, 1893. The property originally belonged to one Hori Lal, who died childless more than thirty years ago, leaving a widow, Musammat Jhunna. For a number of years prior to the death of Jhunna, Bindraban, who was a natural son of one Batuk, the brother of Jhunna, lived with Hori Lal and Jhunna, and, it is alleged by the defendant, was adopted by Hori Lal. Jhunna made a will, dated the 3rd December, 1880, whereby she purported to leave to Bindraban all the movable and immovable properties then in existence. After the death of Jhunna, Bindraban remained in undisturbed possession of the property in suit until his death on the 6th July, 1895, whereupon his son Balkishan became possessed of it. Balkishan died on the 6th September, 1895, and thereupon Musammat Gaura, the widow of Bindraban and mother of Balkishan, entered into and remained in possession until her death on the 12th September, 1895. She made a will, dated the 10th September, 1895, whereby she purported to leave the property in dispute to the defendant, who was the nephew of Bindraban, being the son of Bindraban's sister, Musammat Kungi. The plaintiff therefore as uncle of Bindraban would have been heir to Bindraban and to

* First Appeal No. 147 of 1898 from a decree of Babu Nil Madhab Rai, Subordinate Judge of Benares, dated the 21st March 1898.

(1) (1865) L. R., 1 Q. B., 1. (2) (1889) I. L. R., 12 All., 51.
(3) (1873) 20 W. R., C. R., 114.

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Balkishan if the adoption of Bindraban by Hori Lal set up by the defendant was not proved; but if the adoption was proved he would have had no title to the property, being a stranger to the family of Hori Lal.

The Court of first instance (Subordinate Judge of Benares) found that Bindraban had been adopted by Hori Lal, and that consequently he had no interest in the property, and accordingly dismissed the suit.

The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the appellant.

Pandit *Moti Lal* and Pandit *Madan Mohan Malaviya*, for the respondent.

THE COURT (STANLEY, C. J., and BURKITT, J.), after discussing the evidence as to the adoption, came to the conclusion that no adoption of Bindraban by Hori Lal had in fact taken place. This being the case, the defendant could not claim to have the suit dismissed on the strength of his own title to the property as part of the estate once of Hori Lal. On the question whether the plaintiff had such an interest in the property as would support a suit for recovery of possession against a person who, having no better title than himself, had ousted him, the Court found as follows:—

There remains then one matter for our determination. The property in dispute admittedly belonged to Hori Lal, and is now in the possession of the defendant. Neither the plaintiff nor the defendant belongs to the family of Hori Lal, and neither of them occupies the position of a reversioner to Hori Lal. Can a suit in ejectment under such circumstances be maintained by the plaintiff as the heir of Balkishan or of Bindraban, both of whom were mere trespassers? Has a trespasser, whose title by prescription has not matured, such an estate as would entitle his heir to maintain a suit in ejectment against a party who has ousted him from possession and who is not the true owner? This question is the subject of legal decision. In the case of *Asher* v. *Whitlock* (1) it was held that a person in possession of land without other title has a devisable interest, and that the heir of his

(1) (1865) L. R., 1 Q. B., 1.

devisee can maintain ejectment against a person other than the true owner who has entered upon the land. In that case a party had, in the years 1842 and 1850, enclosed a piece of land from the waste of a manor and built upon it. He occupied the land until his death in 1860. By his will he devised the land to his wife during widowhood, and after her death or re-marriage, whichever event should first happen, to his only daughter in fee. The widow remained in possession with her daughter, and in 1861 the widow married the defendant. Early in 1863 the mother died, and the daughter died shortly afterwards. The defendant remained in possession, and a suit to eject him was brought by the heir-at-law of the daughter, and was determined in favour of such heir. This decision was approved of by their Lordships of the Privy Council in the case of *Sundar* v. *Parbati* (1) and it seems to us to govern the present case. In the case of *Brindabun Chunder Roy* v. *Tara Chand Banerjee* (2) it was held that such an interest in land was capable of being sold in execution. The law appears to be that a person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable.

For the foregoing reasons we allow the appeal. We set aside the judgment and decree of the lower Court, and give a decree in favour of the plaintiff appellant for possession of the property in suit with costs in both Courts.

Appeal decreed.

(1) (1889) I. L. R., 12 All., 51. (2) (1873) 20 W. R., C. R., 114.

1901
November 21.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

THE BHARTPUR STATE (DEFENDANT) *v.* GOPAL DEI (PLAINTIFF).*

Hindu Law—Hindu widow—Widow's right to maintenance—Maintenance not a charge on the joint family property unless made so by a decree or by agreement.

The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband unless and until it is fixed, and charged upon the estate by a decree or by agreement; and if such estate has been alienated and is in the hands of a *bonâ fide* transferee, the widow cannot follow the property, even though it be the case that the transferee had notice of her claim for maintenance. *Sheo Buksh Singh* v. *Mussumat Gunneshee Koonwur* (1), *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (2) and *Ram Kunwar* v. *Ram Dai* (3) referred to.

THE suit out of which this appeal arose was one brought by a Hindu widow to recover arrears of maintenance and for a declaration that certain immovable property in the possession of the defendants was charged with the payment of the plaintiff's maintenance. The plaintiff was the widow of one Damodar Das, the son of Joti Prasad, a wealthy banker of the city of Agra. In the year 1865 the plaintiff had sued her husband for maintenance on the ground that he was possessed of certain separate property. In that suit the Court found that Damodar Das was a member of a joint Hindu family, and that the property, with reference to which the suit had been brought, was not his separate property. The Court, however, having regard to the position of the family, gave the plaintiff a decree for maintenance at the rate of Rs. 120 per mensem. This maintenance allowance was paid for many years, but the family got into difficulties and its property was sold up; and amongst other items the villages which had been in the possession of Damodar Das at the time of the plaintiff's suit in 1865. The plaintiff's maintenance ceased to be paid and hence the present suit.

The Court of first instance (Subordinate Judge of Agra) decreed the claim, holding that the meaning of the judgment and decree of 1865, which decreed the widow's claim to maintenance "with reference to" the income of the property in the hands of her husband, was that the claim for maintenance should be a

*First Appeal No. 191 of 1898, from a decree of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 24th June 1898.

(1) S. D. A., N.-W. P. 1864, Vol. I, p. 228.
(2) (1877) I. L. R., 2 Bom., 494.
(3) (1900) I. L. R., 22 All., 326.

charge on the property into whosesoever hands it might come, and that the defendants had constructive if not actual notice of the widow's claim.

An appeal was preferred to the High Court by one of the defendants who had purchased some of the property at auction sale; and it was contended that on a proper construction of the decree of 1865 no charge was created on the property, and that even if this defendant had knowledge of a claim for maintenance on the part of the widow, that was not sufficient to bind the property in his hands.

The Hon'ble Mr. *Conlan* (for whom Mr. *W. K. Porter*) and Mr. *D. N. Banerji* (for whom Dr. *Satish Chandra Banerji*), for the appellants.

Pandit *Moti Lal* and Babu *Satya Chandra Mukerji* (for whom Munshi *Gulzari Lal*), for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a judgment of the Subordinate Judge of Agra allowing the plaintiff's claim, which was for a declaration that arrears of maintenance, due to her, and also future maintenance, were charged upon certain properties under a decree made in the year 1865. The plaintiff is the widow of one Damodar Das, who was one of the sons of Joti Prasad, a well known Agra banker, who died in his father's life-time some time before the year 1865. In the suit of 1865, his widow, the present plaintiff, claimed delivery of possession of certain zamindari property as having been the separate property of her deceased husband. That property on the hearing of that suit was found not to have belonged to her husband, and the claim for possession was dismissed: but the learned Judge, having regard, as he says in his judgment, to the decision of the Sadr Court, in the case of *Sheo Buksh Singh and others*, dated the 29th February, 1864, decided that the plaintiff should get a maintenance allowance from the defendant. In the case to which he referred, it was decided that the Courts were "competent to assign maintenance to a widow of a deceased Hindu who cannot by law inherit her husband's property, and that in fixing the amount reference must be had to the value of the estate from which maintenance is claimed, and that not more than one-third should ever be

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assigned" of the annual profits of the family estates. Acting upon that decision the learned Judge thought fit to award to this lady maintenance at the rate of Rs. 120 a month. The language in which the maintenance is given is as follows:—"The plaintiff should get maintenance allowance from the defendants with reference to the income of the property, and for the sake of her satisfaction and (here the decree is torn) the plaintiff should get Rs. 120 a month from the defendants." It appears that the allowance so given has fallen into arrears, and the plaintiff's claim against the defendants in the present suit is to have it declared that the maintenance is a charge upon the properties, delivery of possession of which was claimed, but was refused by the Court in the suit of 1865. These properties have been sold to *bonâ fide* purchasers, but it is said by the plaintiff that the purchasers had knowledge that the widow had a claim to maintenance, and are therefore liable to pay the arrears, and also future maintenance. For the purposes of our judgment we may assume that they had this knowledge. The first question then is, whether or not, by the decree of 1865, maintenance was expressly charged upon the property of the then defendants, which is the property now sought to be made liable. It appears to us that there are no words in this decree which could possibly be regarded as creating a charge. The words "with reference to the income of the property" were evidently used in connection with the case decided by the Sadr Court to which we have referred, and in which it is stated that the allowance of maintenance ought to be made with reference to the income of the property. In other words, the income of the property was to be taken as a basis for estimating the amount of maintenance to which the widow was properly entitled. There is no charge created either in express words or by implication. It would appear that the words in the decree, "with reference to the income of the property," are copied from the judgment of the learned Judge. In it he says:—"I rule for plaintiff to recover from the defendants maintenance with reference to the income of the property." If there has been no express charge of maintenance upon the property, then it is manifest upon the authorities that the plaintiff's contention cannot prevail. In the case

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of *Lakshman Ramchandra Joshi* v. *Satyabhamabai* (1), West, J., discussed the authorities at length, and held that there was no authority for the doctrine which makes the claim of widows not entitled to a share of property, in case of partition, a real charge on the inheritance; that in all cases it is a claim to maintenance merely, not interfering (so long as it has not been reduced to certainty by a legal transaction) with the right of the actually participant members to deal with the property at their discretion, provided this dealing is honest and for the common benefit. It was also decided in that case that "the mere circumstance that the purchasers had notice of the widow's claim is not conclusive of the widow's rights against the property in their hands." The question came before a Bench of this Court in the case of *Ram Kunwar* v. *Ram Dai* (2), and it was held by Banerji and Aikman, JJ., that "the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement, and that the widow's right is liable to be defeated by a transfer of the husband's property to a *bonâ fide* purchaser for value, even with the knowledge of the widow's claim for maintenance, unless the transfer has further been made with the intention of defeating the widow's claim." In fact a widow's right to receive maintenance is one of an indefinite character, which, unless made a charge upon the property by agreement or by a decree of the Court, is only enforceable like any other liability in respect of which no charge exists. For these reasons we are of opinion that the learned Subordinate Judge was in error in deciding that the decree in this case made the arrears of maintenance a charge upon the property. On this point, therefore, the appeal must be allowed.

It is argued, however, by the respondent's vakil that the present appellant, *viz.* the Bhartpur State, is not entitled to maintain the appeal, inasmuch as the Bhartpur State has, as we understand him, no legal existence. It is sufficient for us to say that the Bhartpur State was, by the plaintiff herself, made a party to the suit as defendant, and a decree was obtained against it. It seems to us that it does not lie in the mouth of the plaintiff

(1) (1877) I. L. R., 2 Bom., 494. (2) (1900) I. L. R., 22 All., 326.

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under those circumstances to raise this technical question. The Bhartpur State then having appealed, and having succeeded in the appeal, under section 544 of the Civil Procedure Code, the judgment which we shall pass will be for the benefit of all the other defendants. Our order accordingly is, that we allow the appeal, set aside the judgment and decree of the lower Court, and direct that the suit stand dismis-ed with all costs.

Appeal decreed.

1901
November 27.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BRIJ MOHAN LAL (PLAINTIFF) *v.* SHIAM SINGH (DEFENDANT).*

Arbitration—Award—Suit for specific enforcement of award—Case in which compensation in money considered impossible to assess.

The defendant leased a village to the plaintiff for a term of five years. In the second year of the lease disputes arose between the parties, which they agreed to submit to arbitration. On the questions submitted to him, the arbitrator delivered an award, which was to the effect—(1) that the lessee should surrender possession at a fixed time within the term of the lease, (2) that the lessee should pay the sum of Rs. 800 to the lessor, and (3) that as to arrears of rent due from the tenants, the lessee should obtain decrees and execute a conveyance of them to the lessor, who was to pay to the lessee the aggregate amount of the decrees.

The other terms of the award having been performed, the lessee sued for specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant, and prayed that the defendant might be ordered to accept the conveyance and pay the amounts of the decrees.

Held that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award, and this was directed in terms of the order made in the case of *Bell* v. *Denver* (1).

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Moradabad dismissing the plaintiff's suit.

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* First Appeal No. 113 of 1901, from a decree of Babu Mata Prasad, Subordinate Judge of Moradabad, dated the 13th April 1901.

(1) (1886) 54 Law Times Reports, 729.

The facts of the case are clear and practically undisputed. The only difficulty we feel is as to the form of the order we ought to pass.

The facts are as follows :—

On July 1st, 1897, the defendant-respondent, who is zamindar of Mauza Pipalsana, granted a lease of that village for a term of five years—1305—1309 F. (1897—1902 A. D.)—to the plaintiff, Brij Mohan, and one Mangal Sen, at an annual rental of Rs. 3,200. Mangal Sen appears to have surrendered his interest in the lease to Brij Mohan. We have no concern with him in this case.

In the year 1898, in consequence of the new settlement, disputes arose between the plaintiff and the defendant about the rental (*jama*) payable by the latter. The parties agreed to refer these disputes to the arbitration of one Pandit Murari Lal of Sherkot, and accordingly on January 31st, 1899, they executed and registered a formal submission to arbitration.

Pandit Murari Lal prepared an award on April 7th, 1899. This award he published on the same day by registering it, and he had it handed to the defendant-respondent, Shiam Singh.

Turning now to the submission to arbitration agreement of January 31st, 1899, let us see what were the matters referred to the arbitrator to decide.

They were four in number, namely—(1) what rental (*jama*) was to be paid by the appellant, the lessee, to the respondent, the lessor, for the years 1306—1309 F. (1898—1902) ? (2) the duration of the lease, *i. e.*, was the lessee to continue to hold for the unexpired portion of the lease ? (3) in case the arbitrator should direct the lease to terminate within the term, then who was to be liable to pay the rents due from tenants to the lessee ? and (4) in the same event, which party was to bear the expenses incurred in breaking up waste land ?

In his award the arbitrator, inverting the order of the questions, decided (1) that the lease was to terminate with the kharif of 1306 F., and that the lessee should surrender possession to the lessor from the commencement of the rabi of that year. As regards the arrears of rent in cash and in kind due to the lessee from the tenants, the award directed that the lessee should

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sue and obtain decrees against the tenants for the arrears due from them, and that on his executing a sale-deed of those decrees to the respondent, the latter should pay to the appellant the amount entered in the decrees.

In this manner the arbitrator disposed of the second and third of the four matters mentioned above. As to the first and fourth, he found that a lump sum of Rs. 800 was due to the lessor, Shiam Singh, and directed that the lessee appellant should pay him that amount. Thus the award directed (1) that the appellant should surrender possession at a fixed time within the term, and (2) should pay Rs. 800 to the respondent. It further directed (3) that the lessor, the respondent here, on receiving a conveyance of decrees for arrears of rent, to be obtained by the lessee against the tenantry, should pay the amounts of those decrees to the appellant, the lessee. As to the acts which were to be done by the appellant under the award, it is admitted that he surrendered possession to the respondent, as directed. As to the payment of Rs. 800, the respondent, in June 1899, sued the appellant in the Rent Court to recover that sum with interest. In his plaint he recited the submission to arbitration and the award, and claimed the Rs. 800 as being due to him by virtue of the award. The lessee (defendant in the Rent Court) pleaded to the jurisdiction of the Rent Court and also alleged part payment. Both these pleas were overruled, and the Assistant Collector, on September 28th, 1899, gave a decree for the Rs. 800 with interest and costs.

By the present suit the appellant lessee seeks to compel the respondent lessor to do that which the award directs him to do. The suit was dismissed in the Court below for reasons to which we shall presently allude. But before going further, we desire to refer to some intermediate proceedings taken in the matter of this award.

Some time early in 1900 (the date does not appear) the appellant lessee applied to the Court to have the award filed in Court under the provisions of section 525 of the Code of Civil Procedure. That application was opposed by Shiam Singh on the allegation (among other objections) that the arbitrator had exceeded his power in directing the sale to Shiam Singh, of

decrees to be obtained by the plaintiff, Brij Mohan. His objections were overruled, and an order was made on April 2nd, 1900, directing the award to be filed in Court. The Court held that the direction as to the sale of the decrees was a good and sensible decision, and, as to the rents, observed that the "question of rent for any particular year was not referred to the arbitrator, but the general question of arrears of rent was referred to him."

Appended to his plaint in the suit now before us, the plaintiff-appellant produced in Court a large number of decrees for arrears of rent against tenants for sums aggregating (with interest) Rs. 6,750, and also a deed of sale executed by him, purporting to transfer those decrees to the respondent, and he prayed the Court to cause those documents to be handed over to the defendant-respondent, and to direct the latter to pay to him (plaintiff-appellant) the aggregate amount of those decrees with interest.

The defendant's reply chiefly consists of an allegation that the arbitrator acted in excess of his powers as to the tenant's rents, as he was empowered only to dispose of the rents accruing due in the years 1306—1309 F., and not those of the year 1305 F.

This contention has been accepted by the Subordinate Judge, who holds broadly that the arbitrator had power only to dispose of the question of rents "beginning from 1306 F." In this the lower Court is clearly wrong. In the submission to arbitration the words used are "who will be liable to pay the rents due by the tenants to the lessee, second party?" These words are perfectly general. There is no restriction whatever in them to the rents due for the kharif of 1306 F. We see no reason why we should import any such restriction. Evidently the lower Court has made the mistake of confusing the earlier portion of the agreement with the later. They refer to two quite distinct matters. The earlier portion empowers the arbitrator to decide what rental (*jama*) is to be paid to the lessor by the lessee for the years 1306 to 1309 F. only, and necessarily so, for the first year (1305 F.) of the term had passed, and the parties came to this agreement in 1306 F., the first of the years as to which there was a dispute.

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But a decision as to the rental payable by the lessee under his lease is quite a different matter from a decision as to arrears of rent due by tenants to the lessee.

It was further urged for the respondent that this is a case in which adequate money relief could be allowed to the plaintiff, and that therefore specific performance should not be allowed. To this it is sufficient to reply that we know of no standard or measure of damages by which in this case we could estimate what compensation should be awarded to the appellant. The learned vakil who appears for the respondent was unable to assist us in this matter. It was also contended that the appellant could himself enforce in execution the rent decrees he has got. To this there is the evident reply that appellant, by the arbitration submission, contracted to abide by terms of the award, which direct him to sell the decrees to the respondent. And as to the allegations in the 6th paragraph of the defendant's written statement we need say no more than they are nothing more than mere surmises. We are unable to agree with any of the remarks of the Subordinate Judge as to the position of an assignee of a decree of a Rent Court, when asking a Rent Court to execute a decree. We have no doubt that he would find no more difficulty in a Rent Court than in a Civil Court.

We have thought it right thus to discuss *seriatim* the various points raised for the respondent in the judgment of the lower Court, in his written statement, and in the argument of his learned vakil. But we are unhesitatingly of opinion that it was not open to the respondent to take any of those pleas. Admittedly, he willingly entered into the agreement of the 31st January, 1899. As far as the award was favourable to him he accepted it and acted on it. He accepted the surrender of the lease when 3½ years of the term were still unexpired. He got the Rs. 800, or at least got a decree for it, on the strength of the award. Appellant has done all that the award directed him to do, even going to the expense of suing the tenants and getting decrees. Under such circumstances we hold that even if the award were bad by reason of the arbitrator having exceeded his powers (which we hold is not the case), the respondent is precluded by his own conduct from impeaching it. He has chosen

to accept and act on it as if it were a good and binding award; he has taken all the advantages it gave him, and we cannot now allow him to say that he is not bound by it.

In our opinion the decision of the lower Court on the merits of the case is wholly wrong and must be set aside. We therefore allow this appeal, and we set aside the judgment and decree of the lower Court with costs in both Courts.

We have had some difficulty in settling the form of the order we should pass in directing specific performance in favour of the appellant. We have been unable to find any case exactly in point in the Indian Law Reports. We have, however, been referred to the case of *Bell* v. *Denver* (1) which is on all fours with the present case. Adopting the form of order made by North, J., in the case just cited, we declare that the plaintiff-appellant is entitled to specific performance on the part of the defendant-respondent of the award of April 7th, 1899, so far as the same remains unperformed, and it appearing that the plaintiff-appellant, in pursuance of the said award, has obtained decrees against tenants for arrears of rent agregating Rs. 6,354-15-0 and has executed a valid sale-deed of the said decrees in favour of the defendant-respondent, and has deposited the same in this Court for delivery to the defendant-respondent, and has, through the learned vakil who appeared for him in this appeal, undertaken to render to the defendant-respondent such assistance on his part as may be necessary (if any) for obtaining execution by the defendant-respondent of the abovementioned decrees, we direct that the said sale-deed be delivered from Court to the defendant-respondent or to his vakil, and we give a decree in favour of the plaintiff-appellant for the sum of Rs. 6,354-15-0 to be paid to him by the defendant-respondent.

Appeal decreed.

(1) (1886) 54 Law Times Reports, 729.

1901
December 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

CHITTA SINGH (PLAINTIFF) *v.* DEBI DIN (DEFENDANT).*

Act No. 1 *of* 1877 *(Specific Relief Act), Section* 42—*Declaratory decree—Burden of proof—Usufructuary mortgagee in possession seeking a declaration that the property is not saleable in execution of a decree on a prior mortgage.*

The plaintiff, a usufructuary mortgagee in possession, came into Court seeking a declaration that the mortgaged property was not saleable in execution of a decree for sale obtained by another mortgagee in a suit on a mortgage prior to his own, on the ground that to this suit the prior mortgagee had not made him a party. *Held* that in such a case the plaintiff had to prove, not only that he had obtained possession as a usufructuary mortgagee and was still in possession, but that his mortgage still subsisted and had not been discharged.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from the decree of the Subordinate Judge of Farrukhabad, dismissing the plaintiff's suit. The facts are very simple. The defendant, who was first mortgagee of some property called mauza Piprauli, brought a suit on foot of his mortgage against the mortgagor, and on the 21st of April, 1897, obtained a decree for the sale of the mortgaged property in satisfaction of the mortgage debt.

The plaintiff in the present suit, who, with his brother, is in possession of the mortgaged property, claims that he and his brother are in such possession under, and by virtue of, a usufructuary mortgage, dated the 15th of March, 1889, and made in their favour by the mortgagor subsequent to the date of the defendant's mortgage. The plaintiff and his brother were not made parties to the defendant's suit, and they contend that the omission to make them parties was contrary to the provisions of section 85 of the Transfer of Property Act, and that the defendant is not therefore entitled to have a sale in execution of his decree. The plaintiff has instituted this suit accordingly, and in the prayer to his claim, seeks a declaration that mauza Piprauli is not saleable in execution of the defendant's decree, but no other

* First Appeal No. 251 of 1898, from a decree of Pandit Rai Indar Narain, Subordinate Judge of Fatehgarh, dated the 26th July 1898.

relief. In his written statement Debi Din alleged, among other things, that the amount of the plaintiff's mortgage has been satisfied by the usufruct, and that the plaintiff has no longer any concern in the mortgaged property.

No evidence was given by the plaintiff in the Court below to prove that his mortgage was subsisting. He contended that the burden of showing that his debt had been paid off lay on the defendant, while the latter maintained that the *onus* of proving that his mortgage was subsisting lay on the plaintiff. The learned Subordinate Judge decided in favour of the defendant's contention and dismissed the suit.

The plaintiff's mortgage was a *zar-i-peshgi* lease, which is in the nature of a usufructuary mortgage. The property was, by the deed of mortgage, granted to him for a term of five years, and the deed provided that the mortgagee should, out of the profits amounting to Rs. 451, pay the Government revenue, and after appropriating the interest on the advance made by him to the mortgagor, should pay the balance to the mortgagor. It was stipulated in the deed that if the mortgagor did not pay off the mortgage debt within the term of five years, the mortgage should continue as a security for the amount remaining due. The term of five years expired on the 15th of March, 1894; but under the last mentioned stipulation the mortgage would continue to be a subsisting security if the mortgage debt has not been satisfied. In our opinion the decision of the learned Subordinate Judge is correct. When a plaintiff seeks from the Court a declaratory decree, it lies upon him to make out his title affirmatively. This is not a case in which a party in possession is defending his title, but one in which a party in possession sets the Court in motion, and seeks a declaration establishing his title against a third party. In such case a plaintiff is in the same position as any other plaintiff and must make out his case. Here the plaintiff had, or ought to have had, the means of satisfying the Court that his mortgage was still subsisting, and if he has failed in doing so, he cannot expect the Court to exercise the discretionary jurisdiction conferred upon it by section 42 of the Specific Relief Act, and to make a declaration, which would be based upon an assumption merely and not upon proved facts, that the property is not

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saleable in execution of a decree which, so far as the evidence before the Court goes, may be a perfectly valid and binding decree. The plaintiff was bound to satisfy the Court that he had an interest in the property, and that by not making him a party to the suit for sale the defendant had failed to comply with section 85 of the Transfer of Property Act.

We think that the learned Subordinate Judge was quite correct in the view which he took, and we must affirm his judgment and dismiss the appeal with costs.

Appeal dismissed.

1901
December 5,

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

WAZIR-UN-NISSA (PLAINTIFF) *v.* ILAHI BAKHSH AND OTHERS (DEFENDANTS) *

Letters Patent, section 8—*Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor—Presentation by agent of a pardah-nashin woman—Civil Procedure Code, sections* 640, 404, 592.

Where an appeal *in formâ pauperis* by a *pardah-nashin* woman, who had sued as a pauper in the Court of first instance, was presented, not by an advocate, vakil or attorney of the Court, nor by the appellant in person, but by her duly authorized agent, it was *held* that this was a good presentation, section 8 of the Letters Patent notwithstanding. *Shiam Karan* v. *Raghunandan Prasad* (1) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Dehra Dun in a pauper suit, by which he declared the plaintiff entitled to a one-seventh share of her father's estate. In her claim the plaintiff asked for a decree for possession of one-seventh of her father's property, but the learned Judge only gave her a declaratory decree. A preliminary objection has been raised to the hearing of this appeal, on the ground that no proper memorandum of appeal

* First Appeal No 291 of 1898 from a decree of L. Stuart, Esq., Subordinate Judge of Dehra Dun, dated the 20th June 1898.

(1) (1900) I. L. R., 22 All., 331.

is before the Court, inasmuch as the application under section 592 of the Code of Civil Procedure was not made by the plaintiff in person, nor by an advocate, vakil or attorney of this Court, and reliance is placed upon the decision of this Court in the case of *Shiam Karan* v. *Raghunandan Prasad* (1), in which it was held that the presentation of an appeal by a person who is not an advocate, vakil or attorney of the Court, nor a suitor, is not a valid presentation in law, having regard to section 8 of the Letters Patent of the High Court. In this case the plaintiff is a *pardah-nashin* lady, and under section 404 of the Code of Civil Procedure, it is provided that, notwithstanding anything contained in section 36, an application to sue *in formâ pauperis* is to be presented to the Court by the applicant in person, unless he is exempted from appearing in Court under section 640 or section 641. Admittedly here the plaintiff is entitled to the exemption contained in section 640 as a *pardah-nashin* lady. In such a case, therefore, under section 404, she may present an application by a duly authorized agent, who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person. It is admitted here that the petition was presented by a duly authorized agent, though not by an advocate, vakil or attorney of the Court; and we are of opinion that, having regard to the provisions of section 404, the appeal was properly presented, and that the case is not governed by the decision to which we have referred. We therefore disallow the preliminary objection.

As regards the merits of the appeal, it has been admitted by the learned vakil for the respondents that he cannot resist the appeal, the Subordinate Judge having made a mistake in not awarding possession of the share of the property to which the decree referred. We therefore modify the decree by directing, in addition to the declaration of title, that the plaintiff be put in possession of the property specified in the decree.

The appeal will be allowed with costs.

Appeal decreed.

(1) (1900) I. L. R., 22 All., 331.

PRIVY COUNCIL.

P. C.
1901
November
30.

MOTI CHAND AND OTHERS (PLAINTIFFS) *v.* GANGA PRASAD SINGH AND ANOTHER (DEFENDANTS.)

[On petition from the High Court of Judicature at Allahabad.]

Privy Council, Practice of—Case below appealable value in Court of first instance—Civil Procedure Code (Act No. XIV of 1882*), sections* 596, 600*—Addition of interest for purpose of valuation of subject-matter of suit—Special leave to appeal—Substantial question of law—Rule as to applications for special leave to appeal in Indian cases.*

Before a case can be certified as a fit one for appeal to His Majesty in Council, the condition prescribed in section 596 of the Civil Procedure Code as to the amount of the subject-matter of the suit in the Court of first instance *and* the amount in dispute on the appeal must both be fulfilled. The word "and" in that portion of the section cannot be read as "or."

Where a case is otherwise unappealable the rule of the Judicial Committee is not to give special leave to appeal unless there is some substantial question of law of general interest involved.

In this case the Judicial Committee laid down a rule to be followed in future in Indian cases, that where a party applies to the Committee for special leave to appeal, the matter being under the appealable value, he should first have applied to the Court below for a certificate under section 600 of the Code of Civil Procedure that the case is otherwise a fit one for appeal to His Majesty in Council. But this rule will not bind the Judicial Committee not to grant such leave in any special case, although that course has not been followed.

Semble—The amount of the subject-matter of a suit in the Court of first instance for the purpose of an appeal to His Majesty in Council is the amount for which a decree is recovered, including interest up to the date of the decree. Interest subsequent to decree cannot, though ascertainable, be added for the purpose of bringing the value up to the appealable amount of Rs. 10,000.

PETITION by the plaintiffs for special leave to appeal from a decree (10th July 1900) of the High Court at Allahabad by which a decree (16th June 1898) of the Subordinate Judge of Azamgarh was reversed and the suit dismissed with costs.

The suit was brought to recover from the defendants Rs. 8,477 with interest until the date of realization as damages for fraud.

The petition stated that in the plaint the following facts were alleged as constituting the cause of action: "The plaintiffs, who were bankers, had monetary dealings with the defendants, which resulted in decrees obtained against them in 1885, 1886 and 1887 for sums amounting to Rs. 4,400. Pending the litigation the first

Present:—LORD DAVEY, LORD LINDLEY AND SIR FORD NORTH.

defendant executed a fictitious deed of gift of his property in favour of his daughter-in-law Rachhpali, the wife of the second defendant, his son: that during execution of the decrees the defendants induced the plaintiffs to accept in lieu of their claim a registered mortgage of this property by Rachhpali and to strike off the execution claims. When the bond was sued on a defence was set up that it was a forgery and it was found so to be."

The defendants in their written statement asserted that the gift to Rachhpali was valid; that the bond alleged to be executed by her was obtained through the instrumentality of the plaintiffs, and that the defendants did not commit any fraud nor give any inducement to the plaintiffs to have the document executed. The Subordinate Judge found that the plaintiffs were innocent of any fraud in obtaining the bond, and that the defendant had throughout the whole transaction practised fraud upon and deceived the plaintiffs into accepting a forged bond in lieu of their claim under the decrees. As the result of his findings he gave a decree for principal and interest up to the date of the decree, a sum of Rs. 9,496, with further interest at 8 annas per cent. up to date of realization, and costs amounting to Rs. 1,193.

From this decree the defendants appealed to the High Court, and that Court on the 10th of July 1900 reversed it and dismissed the suit with costs. In their judgment the High Court said:—

"We agree with the Subordinate Judge so far that we are satisfied that the bond of 28th November 1887 was a forgery. Rachhpali was no party to it. It was signed by the defendants and registered by them after they had pretended to identify some one behind a pardah as Rachhpali, who was not there. We have no doubt that the defendants were guilty of fraud in all they did in connection with that bond. We find upon the evidence that as the plaintiff, Damodar Das, knew that he was taking a bond which was intended to defraud Rachhpali, and further that he distinctly favoured, if he did not instigate the execution of this bond, he was a party to the fraud by which he finds himself hoisted, and it is not for him to complain that the transaction has now resulted in loss to himself. The execution and registration of the deed were in our opinion false to his knowledge. We cannot assist him in such a case."

Against this decree the plaintiffs applied to the High Court for leave to appeal to the Privy Council, but the High Court

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refused to certify that the case fulfilled the requirements of section 596 of the Code of Civil Procedure because the claim and decree in the original court were for less than Rs. 10,000.*

In the petition for special leave to appeal, the plaintiffs submitted that the order of the High Court refusing to certify the case as a fit one for appeal was wrong, on the following grounds: (1) because the suit in the original court claimed a sum of money consisting, 1st of a defined sum of Rs. 8,477, and, 2ndly, of the further contingent sum of interest thereon until realization; (2) because the decree of the original court had ascertained the interest so as to make the entire sum due at the date of the decree Rs. 9,496, with a further ascertained sum of Rs. 570 payable annually until realization; (3) because before the decree of the High Court the entire sum claimed in the original court had been ascertained as reaching a sum of Rs. 10,636 with further contingent increments.

Mr. *Mayne* for the petitioners contended on the above grounds that the amount of the subject-matter in the suit in the court of first instance was above Rs. 10,000, and that the High Court ought therefore to have certified the case as a fit one for appeal under section 596 of the Code of Civil Procedure. *Ram Kirpal Shukul* v. *Rup Kuar* (1), and *Joogulkishore* v. *Jotendro Mohun Tagore* (2) were referred to. The Judicial Committee have a discretion to grant leave to appeal in cases where the specified amount of Rs. 10,000 can only be reached by the addition of interest subsequent to the decree; *Gooroo Persad Khoond* v. *Juggat Chunder* (3). In the exercise of that discretion special leave might be granted in this case although there is no substantial question of law. [The following cases were referred to by Lord Davey during the argument, with reference to the addition of interest to a decree to bring it up to the appealable amount, and to making an application to the Court below before coming to the Privy Council. *Gooroo Persad Khoond* v. *Juggut Chander* (3) per Turner, L. J., at page 167 of the report, *Mutusawmy Jagavera Yettapa Naiker* v. *Venkatoswara Yettia* (4) *per* Lord

* *See* Weekly Notes, 1901, p. 19.

(1) (1881) I. L. R., 3 All., 633.
(2) (1882) I. L. R., 8 Calc., 210.
(3) (1860) 8 Moo., I. A., 166.
(4) (1865) 10 Moo., I. A., 313.

Chelmsford, L. C., at page 319 of the report, and *Bank of New South Wales* v. *Owston* (1) at pages 274, 275 of the report.]

1901, 30th November:—The Judgment of their Lordships was delivered by LORD DAVEY:—

IN this case their Lordships think that the High Court took a correct view of section 596 of the Civil Procedure Code, and rightly held that the case did not comply with the conditions prescribed in that section. The section is in these terms: "The amount, or value of the subject-matter of the suit in the court of first instance, must be Rs. 10,000, or upwards, and the amount or value of the matter in dispute on appeal to Her Majesty in Council must be the same sum, or upwards." Their Lordships think that the High Court were quite right in saying that the word "and" means "and" and not "or." In the present case the amount or value of the subject-matter of the suit in the court of first instance, construing that in the manner most favourable to the proposed appellant, was at the outside the amount for which he recovered his decree which was below Rs. 10,000, amounting, in round numbers, I think, to about Rs. 9,500 only. That really disposes of the question, because it does not fulfil both conditions.

But then Mr. Mayne suggests that their Lordships ought to give special leave to appeal. Now, the practice of this Board in advising His Majesty to exercise His prerogative, and to give special leave to appeal, is well known, and this Board does not advise His Majesty to exercise His prerogative in that manner unless there is some substantial question of law of general interest involved. In the present case there does not appear to be any such question of law involved. It appears to their Lordships that what is decided in the Court below is very fully stated in the petition. It appears to have been a mere question of fact. The Court below thought that the plaintiffs were entitled to a decree. The High Court, not differing from the view of the facts taken by the Court below, thought that it also appeared from evidence that the plaintiffs were so far *participes criminis* in the fraud which was alleged that they could not recover against the other parties to the fraud, and on that ground

(1) (1879) L. R., 4 A. C., 270.

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they allowed the appeal. Their Lordships cannot say, and Mr. Mayne very fairly could not say, that that involved any question of law at all, much less a substantial question of law of general interest. They therefore cannot see their way to advise His Majesty to grant the prayer of the present petition.

Their Lordships desire only to make one further observation, and it is this: that where a party in an Indian case (and this observation is confined to Indian cases) comes to this Board and asks for special leave to appeal, the matter being under the appealable value, their Lordships think that he should first apply to the Court below for a certificate under the second part of section 600, namely, "that it is otherwise a fit one for appeal to Her Majesty in Council." Section 598 prescribes that: "Whoever desires to appeal under this chapter to Her Majesty in Council must apply by petition to the Court whose decree is complained of"; and section 600 prescribes what must be stated in the petition, namely, "that the case fulfils the requirements of section 596, or that it is otherwise a fit one for appeal to Her Majesty in Council." Their Lordships think it is a good rule to lay down, that where a party comes for special leave to appeal, the case being under appealable value, and therefore not an appeal as of right, he should in the first instance apply to the High Court for leave to appeal, on the ground that it is otherwise a fit one for appeal to His Majesty in Council. Their Lordships believe that no rule to that effect has been laid down in any previous case, and they, therefore, would not act upon it in the present case; but their Lordships desire it to be considered that in future that rule will be followed, without of course binding this Board not to advise His Majesty to exercise His prerogative in any special case, although that course has not been taken. As a rule, however, they think that that course ought to be followed.

Application for special leave refused.

Solicitor for the petitioners:—Mr. *T. C. Summerhays.*

J. V. W.

APPELLATE CIVIL.

1901
December 10.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BANSIDHAR (DEFENDANT) *v.* GAYA PRASAD (PLAINTIFF).*

Mortgage by conditional sale—Prior and puisne mortgagees—Payment by puisne mortgagee, defendant in prior mortgagee's suit for foreclosure, of amount due on the prior mortgage—Application by such puisne mortgagee for an order absolute for foreclosure—Application refused—Separate suit by puisne mortgagee for foreclosure—Act No. IV of 1882 *(Transfer of Property Act), section* 74*—Civil Procedure Code, section* 244.

In July, 1889, one Fateh Chand executed a mortgage by conditional sale of a certain village in favour of Bansidhar and Kunj Bihari Lal. In October, 1889, Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of Bansidhar and Anant Ram. In October, 1891, Anant Ram transferred his interest in the second mortgage to Gaya Prasad. In September, 1893, Bansidhar and Kunj Bihari instituted a suit for foreclosure of their mortgage. To that suit Raj Kumar, the son of the original mortgagor, and Gaya Prasad were made defendants. On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of October, 1889. On the 22nd December foreclosure decrees were passed in both suits, and six months' time was allowed for redemption. The time allowed for redemption was extended from time to time, and ultimately, on the 3rd of January, 1896, Gaya Prasad paid into Court the sum which was due to the mortgagees on the mortgage, of July 1889, which sum was drawn out by the mortgagees. Subsequently to this payment into Court Gaya Prasad applied to the Court in the suit on the prior mortgage, and prayed that the right of the defendant in that suit to redeem the mortgaged property might be extinguished and an order absolute for foreclosure granted in the applicant's favour. This application was refused, on the ground that Gaya Prasad was only entitled to bring a suit for foreclosure and "had not acquired the status of a decree-holder," and that while he was a defendant, he could not execute the decree as a decree-holder and could not get a decree for absolute foreclosure. There was no appeal from this order, but Gaya Prasad submitted to it and brought a separate suit for foreclosure.

Held that under the above circumstances no such separate suit for foreclosure would lie.

Kedar Nath v. *Lalji Sahai* (1), *Oudh Behari Lal* v. *Nageshar Lal* (2) and *Ajudhia Pershad* v. *Baldeo Singh* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

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* First Appeal No. 215 of 1898 from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Mainpuri, dated the 23rd June 1898.

(1) (1889) I. L. R., 12 All., 61. (2) (1890) I. L. R., 13 All., 278.
(3) (1894) I. L. R., 21 Calc., 818.

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BANSIDHAR v. GAYA PRASAD.

Pandit *Moti Lal Nehru*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Mainpuri, passed in favour of the plaintiff, Gaya Prasad. The suit was brought for foreclosure of the village Patara in the district of Mainpuri under a mortgage by way of conditional sale, without giving the mortgagor and puisne mortgagees an opportunity of redeeming, and in the alternative, for foreclosure giving a right of redemption to some of the defendants, and also claiming, in case a decree for foreclosure should not be granted, recovery from the defendant, Bansidhar, of a sum of Rs. 7,546-8-0 and interest.

The Subordinate Judge gave a decree for foreclosure.

The facts are shortly as follows:—

On the 20th of July, 1889, one Chaudhri Fateh Chand executed a mortgage by conditional sale of the village Patara in favour of the appellant and of one Kunj Bihari Lal to secure re-payment of a sum of Rs. 7,101 and interest.

On the 22nd of October, 1891, Chaudhri Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of the appellant and of one Anant Ram to secure repayment of a sum of Rs. 10,000 and interest.

On the 1st of October, 1891, Anant Ram transferred his interest in this mortgage to the respondent, Gaya Prasad. On the 27th of September, 1893, the appellants, Bansidhar and Kunj Bihari Lal, instituted a suit, No. 123 of 1893, for foreclosure, under their mortgage of the 20th of July, 1889, against Chaudhri Raj Kumar, the only son of the mortgagor, Chaudhri Fateh Chand, who was then dead, as the principal defendant, and also against the respondent, Gaya Prasad, as a puisne incumbrancer.

On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of the 22nd of October, 1889. On the 22nd of December, 1894, foreclosure decrees were passed in both these suits, and six months' time was allowed for redemption. The time for redemption was extended from time to time until ultimately, on the 3rd of January, 1896, Gaya Prasad, the respondent in the present suit, in order to prevent an order absolute for foreclosure being passed against him, paid into Court the

sum which was then due to the mortgagees on foot of the mortgage of the 20th of July, 1889, namely, the sum of Rs. 15,093. This money was subsequently drawn out of Court by the appellants, Bansidhar and Kunj Bihari Lal, the mortgagees.

Having paid the amount so due, Gaya Prasad acquired all the rights and powers of the first mortgagees in respect of the mortgaged property by virtue of section 74 of the Transfer of Property Act. He thereupon, on the 3rd of August, 1897, made an application to the Court in the first mentioned mortgage suit, and prayed in it that the right of the defendant in that suit to redeem the mortgaged property might be extinguished, and an order absolute for foreclosure granted in his (the applicant's) favour. The learned Subordinate Judge, by an order dated the 6th November, 1897, refused this application on the ground, as he says in his judgment, that Gaya Prasad, by paying off the mortgage debt and so becoming the representative of the mortgagees under section 74 of the Act to which we have referred, was only entitled to bring a suit for foreclosure, and "had not acquired the status of a decree-holder," and that while he was a defendant he could not execute the decree as a decree-holder, and could not get a decree for absolute foreclosure. There was no appeal from this order. Gaya Prasad acquiesced in it and brought the present suit.

The appellant, Bansidhar, alone of the defendants, has defended the suit, and his principal defence was that the suit does not lie, inasmuch as a decree for foreclosure of the property in question has already been passed in a suit to which the plaintiff, Gaya Prasad, is a party, and that the questions sought to be raised in this suit were determinable on an application for execution in the former suit under section 244 of the Civil Procedure Code, and not by a separate suit.

The Subordinate Judge did not accede to this contention, but gave a decree for foreclosure in favour of the plaintiff-respondent, holding that the decree passed in favour of Bansidhar and Kunj Bihari Lal in suit No. 123 of 1893 had, under section 86 of the Transfer of Property Act, been fully satisfied by the payment made by Gaya Prasad, and that "after the satisfaction of the prior debt there remained no dispute between the decree-holders"

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(sic). We presume by this last paragraph that he intended to convey that between the original decree-holders and the representatives of the mortgagor there remained no dispute for determination. We do not clearly understand the reasons assigned by the learned Subordinate Judge for his judgment, but we presume that he meant by it that, inasmuch as the plaintiffs, the prior mortgagees, had been paid off, there was no party interested as a decree-holder before the Court who could enforce execution of the decree, and that consequently section 244 of the Code of Civil Procedure had no application. This is the most favourable construction for the respondent which we can put upon the language of the judgment. Is this view correct? It seems to us clear that Gaya Prasad, who, as second mortgagee, was a party to the suit, when he paid off the claim of the plaintiffs, acquired under section 74 of the Transfer of Property Act all the rights and powers of the first mortgagees, the decree-holders, in respect of the mortgaged property, and in effect stepped into the shoes of the plaintiffs, so far as regarded the enforcement of their rights. He practically became the decree-holder in place of the original decree-holders. The suit was not thereby terminated, nor did the plaintiffs cease to be parties to it, although they ceased no doubt to have any substantial interest in its further prosecution. It still remained for the Court to adjust the rights and liabilities of all parties to the suit in respect of the mortgaged property and in respect of costs; and if necessary for that purpose, to make and enforce an absolute order for foreclosure. The right which belonged to the plaintiffs to have the primary decree effectually worked out by execution passed to Gaya Prasad by virtue of section 74 of the Act above referred to, he having satisfied the claim of the plaintiffs. With the change of interest so caused the suit continued to be a subsisting suit. If this is not the effect of the section, and if payment under it terminates a suit, it is obvious that serious loss in costs and time would be incurred by puisne mortgagees—parties to the suit—who might be desirous of redeeming or of enforcing their claims, inasmuch as in order to redeem or enforce their claims, they would be obliged to institute separate suits, and the costs incurred by them in the earlier suit would be thrown away. If, as we

think, the suit continued as a subsisting suit after the payment of the plaintiff's claim, and if Gaya Prasad acquired a right to prosecute the suit with a view to protect his own interests, then it is clear upon the authorities in this Court that the application which was made by him for an order absolute for foreclosure was proper, and the only application he could make, and was an application in execution under section 244 of the Code of Civil Procedure and ought to have been granted.

In the case of *Kidar Nath* v. *Lalji Sahai* (1), it was held by a Full Bench of this Court that the order mentioned in section 87 of the Transfer of Property Act, *i.e*, an order absolute for foreclosure, is an order in execution of the primary decree for foreclosure, and is appealable as a decree under section 244 read with section 2 of the Civil Procedure Code. This decision was followed by a Full Bench of this Court in the case of *Oudh Behari Lal* v. *Nageshar Lal* (2). A different view upon this question was taken by the Calcutta High Court in the case of *Ajudhia Pershad* v. *Baldeo Singh* (3), which has been followed by that Court in several later decisions. We, however, are bound by rulings of the Full Bench of this Court. The learned advocate for the respondent, recognizing that the decisions of this Court were against him on this question had recourse to an ingenious argument. He says that in suit No. 123 of 1893, the suit in which his client, Gaya Prasad, paid the amount of the prior mortgagee's claim, Bansidhar was not a party in the capacity of a puisne incumbrancer, but in that of a prior mortgagee only, and that, inasmuch as his claim in that suit as a prior mortgagee was satisfied, the suit came to an end so far as he was concerned, and no claim which he had as puisne mortgagee could have been determined in that suit, and that a separate suit became necessary for the purpose of having the questions decided, which are raised in the present litigation. We wholly fail to appreciate this contention. Bansidhar was first mortgagee and also a puisne incumbrancer. He could not as first mortgagee sue himself as a puisne mortgagee, and therefore he was not named a party defendant as well as a plaintiff, but he made his co-mortgagee in the puisne mortgage a defendant, as such puisne mortgagee, so

(1) (1889) I. L. R., 12 All., 61. (2) (1890) I. L. R., 13 All., 278.
(3) (1894) I. L. R., 21 Calc., 818.

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that all persons who had an interest in the mortgaged property might be represented before the Court. The personality of a plaintiff to a suit of this kind cannot be split up so as to enable him or any other party to say that he was before the Court in respect of one interest which he possessed in the mortgaged property and not of another. If, instead of an order for foreclosure, an order for sale had been made, and the property had been sold and conveyed to a stranger, could Bansidhar have afterwards been listened to, if he contended that the sale was not binding on him as a puisne mortgagee, inasmuch as he was not a party to the suit as a puisne mortgagee, but only as a first mortgagee? Clearly not. So here when Bansidhar sought the aid of the Court as a plaintiff in the enforcement of his right as first mortgagee, he necessarily submitted for the Court's adjudication all questions arising in regard to his rights or liabilities generally in respect of the mortgaged property.

But another point has been made by the learned pleader for the respondent. He argues that, inasmuch as the mortgagor has not appealed from the decree which has been passed in this suit, the appellant has no *locus standi* for appealing. An obvious answer to this is, that the plaintiff-respondent made the appellant a party to the suit, and that a decree has been passed against him. It does not, therefore, lie in the respondent's mouth now to say that the appellant has not a right to appeal.

The decision of the Subordinate Judge in the former suit refusing to give Gaya Prasad an order absolute for foreclosure was a wrong decision, and would most certainly have been set aside on appeal, but Gaya Prasad submitted to and acquiesced in it, and he must take the consequences.

For the foregoing reasons we are of opinion that this suit is not maintainable. We hold that it is barred by the provisions of sections 244 of the Civil Procedure Code, and that the plaintiff-respondent has mistaken his remedy, and should have appealed against the order of the 6th of November, 1897, instead of instituting a separate suit. We therefore allow this appeal. We set aside the decree of the lower court as against all the persons impleaded as defendants, and we direct that the suit do stand dismissed.

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The case is a hard one upon the respondent, for in bringing the suit he followed the ruling of the Subordinate Judge after the latter had refused to give him an order to which he was entitled. The appellant was represented at the hearing of that application, and must have acquiesced in, if he did not support, the ruling.

Under these circumstances we do not think that this is a case in which costs should be awarded to the appellant, and we accordingly make no order as to costs of this appeal.

Appeal decreed.

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December 19.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DELHI AND LONDON BANK, LIMITED (PLAINTIFF), *v.* BHIKARI DAS AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), section 74—Mortgage—Rights of prior and puisne incumbrancers inter se.*

The puisne mortgagees instituted a suit on their mortgage without making the prior mortgagees parties thereto, and got a decree for sale on the 6th April, 1895, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st September, 1896.

The prior mortgagees instituted a suit on their mortgage without making the puisne mortgagees parties thereto, and got a decree for sale on the 11th December, 1894, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st November, 1896, and obtained possession thereof on the 21st January, 1897.

The puisne mortgagees then sued the prior mortgagees, claiming possession of the property purchased by the latter on payment of the actual purchase-money, or of the sum which was due upon their mortgage at the date of the institution of their suit.

Held—(1) that the puisne mortgagees were entitled to be put into possession on payment to the prior mortgagees of the sum which was actually due upon the prior mortgage at the date upon which the prior mortgagees purchased, and (2) that such possession was, as to the property included in their own mortgage, proprietary; but, as to the property not so included, possession as mortgagees only: they were not entitled to the rights of the prior mortgagees as purchasers of the equity of redemption.

THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. *W. M. Colvin* (for whom Babu *Durga Charan Banerji*) and Mr. *D. N. Banerji*, for the appellants.

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* First Appeal No. 258 of 1898 from a decree of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Shahjahanpur, dated the 15th August 1898.

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DELHI AND LONDON BANK, LIMITED v. BHIKARI DAS.

Pandit *Sundar Lal* (for whom Pandit *Madan Mohan Malaviya*), Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*) and Munshi *Jang Bahadur Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal and a cross appeal from a decree of the Subordinate Judge of Shahjahanpur. The suit was brought by the appellant Bank for possession of certain zamindari property situate in several villages on the ground that the defendants had acquired no right to it under a purchase made by them on the 21st of November, 1896, and in the alternative for redemption of the property on payment of the sum of Rs. 4,500, which sum represents the purchase-money paid by the respondents on the occasion of their purchase, or a sum of Rs. 7,450, which was the amount of the defendants' mortgage at the date of the institution of their suit. The facts are shortly these. One Suraj Mal borrowed Rs. 12,000 from the appellant Bank, and by way of security for the payment of this sum and interest, executed a deed of mortgage on the 16th of July, 1892. On foot of this mortgage the Bank instituted a suit for recovery of the moneys due to them, and obtained a decree for sale of the mortgaged property on the 6th of April, 1895, and at the sale, which was subsequently held in pursuance of that decree on the 21st of September, 1896, the Bank purchased the property which was included in its mortgage. It appears that Suraj Mal had, so long ago as the 29th of May, 1882, mortgaged the property which was comprised in the plaintiff's (the Bank's) mortgage with other property to one Narain Das, whose representatives the defendants are. The defendants instituted a suit on foot of their mortgage, and obtained a decree for sale of the mortgaged property on the 11th of December, 1894, and at the auction-sale they themselves purchased the property for a sum of Rs. 4,500. This was on the 21st of November 1896, and they got possession on the 21st of January 1897. Contrary to the provisions of section 85 of the Transfer of Property Act, the plaintiff Bank did not implead in their suit the defendants respondents, nor did the latter implead the Bank in the suit which they instituted. The present suit has been instituted by the Bank, as we have stated, to have it declared that the defendants acquired no right to the property under their purchase, and in the alternative for redemption. The

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Subordinate Judge passed a decree in favour of the Bank, and directed that on payment of a sum of Rs. 13,638-10-0, which was the amount then actually due to the respondents for principal and interest on foot of their mortgage at the date of their purchase, the Bank should have proprietary possession of the property included in its mortgage, and possession as mortgagee of the property which was not included in that mortgage, but which was included in the respondents' mortgage, and which had passed to them under their purchase. The Bank has appealed against this decree on two grounds. First, on the ground that it should not have been directed to pay a larger sum for redemption of the property than the actual amount of the purchase-money, namely Rs. 4,500, or, at least, the sum for which the respondents had instituted their suit. This contention was not, however, seriously pressed. It appears to us perfectly clear on the authorities that the prior mortgagees were entitled on redemption to be paid the sum which was actually due to them for principal and interest at the date when they obtained possession of the property under their purchase. The Bank also contend that it is entitled not merely to a decree for proprietary possession of the property comprised in its mortgage, but also to a decree for proprietary possession of the residue of the property which was not included in that mortgage. The respondents say that the Bank is not entitled to any modification of the decree in this respect. The Bank contends that, inasmuch as it paid the first mortgagees the full amount of their claim, it was entitled, under section 74 of the Transfer of Property Act, to all the rights and powers of the first mortgagees in the mortgaged property; and that, inasmuch as the mortgagor's interest in the property had passed to the mortgagees upon their purchase made on the 21st of September, 1896, the Bank was entitled to stand in the shoes of the mortgagees, and to have their rights not merely as mortgagees, but also as purchasers of the equity of redemption, that is, of the mortgagor's interest. The respondents, on the other hand, contend that when the Bank paid the entire mortgage debt due to the first mortgagees, the Bank merely placed itself in the position of the first mortgagees who were so redeemed, and acquired a right to treat the mortgagor as its mortgagor, and to hold that portion of the

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property, in which it would have no interest but for the payment, as a security only for any surplus payment it may have made. The sale by the first mortgagees was impeached in this suit by the Bank, and is undoubtedly invalid in law as against the puisne incumbrancers, inasmuch as they were not impleaded in the suit which resulted in the sale. It appears to us that the Bank, though it impeaches this sale, yet seeks in the appeal, which is now being prosecuted, to obtain an advantage under it to which it is not entitled. The sale by the first mortgagees was undoubtedly not binding upon the puisne mortgagee, inasmuch as the Bank was not impleaded as required by the provisions of section 85 of the Transfer of Property Act. This being so, the Bank retained its ordinary right as a puisne mortgagee to redeem the property. Having elected to redeem the property and having paid off the prior mortgagees' claim, the Bank undoubtedly acquired, under section 74 of the Act to which we have referred, all the rights and powers of the first mortgagees; but, in the words of the section, "as such," *i.e.* "mortgagees." But the section does not give the Bank any right or interest which the first mortgagees may have acquired otherwise than as such mortgagees. This, it appears to us, left outstanding the equity of redemption in the property which was not included in the Bank's mortgage. The mortgagor's equity of redemption either passed to the first mortgagees under the sale made to them, or it did not. If it did pass to them, they acquired it at the auction-sale held in execution of their decree, as purchasers and not as mortgagees. If it did not pass to them the equity of redemption remains outstanding in the mortgagor who has not been made a party to this suit. We are of opinion, therefore, that the contention which has been so ably put forward by Mr. *Malaviya* is correct, and that the rights of the parties, as they have been presented to us by him, are consonant with the principles which govern the relations of mortgagors and successive mortgagees in cases in which their respective rights and obligations are involved. We, therefore, hold that the contention of the Bank in this respect is not well-founded. The decision of the lower Court must, therefore, be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

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December 19.

SHEO PRASAD SINGH (OBJECTOR) *v.* JALEHA KUNWAR AND ANOTHER (RESPONDENTS).*

Act No. I of 1894 *(Land Acquisition Act), sections* 31 *and* 32*—Land taken up for public purposes, such land being in possession of a Hindu widow holding in right of her deceased husband—How compensation in respect of such land should be allotted.*

Where land which was taken up by the Government under the Land Acquisition Act for public purposes was held at the time by two widows holding the usual Hindu widow's life estate therein, it was *held* that the compensation awarded for such land should not be paid over to the widows, but should be invested in land to be held on similar terms. *Sheoratan Rai* v. *Mohri* (1) followed.

IN this case certain land in mauza Saidpur, in the Ghazipur district, was taken up by Government under the Land Acquisition Act, 1894, for the Bengal and North-Western Railway. The land in question belonged to two Hindu widows who held the usual Hindu widow's estate in it, and were not the absolute owners. Compensation was duly allotted in respect of the land in question, when one Sheo Prasad Singh, who alleged himself to be the next reversionary heir, applied to stop the compensation from being paid over to the widows. The case was made over under section 18 of the Land Acquisition Act to the District Judge, who decided in favour of the widows. The reversioner appealed to the High Court.

Mr. *Muhammad Ishaq*, for the appellants.

Babu *Bishnu Chandar Moitra* for the respondents.

STANLEY, C. J., and BURKITT, J.—The question in this appeal arises under the Land Acquisition Act. Certain property was taken over by Government, the present owners of which are two Hindu widows whose husbands owned the property. A party, representing himself to be the reversionary heir, has objected to the payment of the compensation money to the widows on the ground that they were not parties competent to alienate the land within the provisions of section 31 of the Land Acquisition Act. It is clear that this section contemplates a present power to alienate, and it is also well settled that Hindu

* First Appeal No. 204 of 1898 from a decree of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 29th July 1898.

(1) Weekly Notes, 1899, p. 96.

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widows cannot, of their own free will, alienate property except for special legal necessities. This was so decided in the case of *Sheoratan Rai* v. *Mohri* (1). We consider that the decision in that case was perfectly correct and governs the present case, and we must therefore allow the appeal, and pass an order under the provisions of section 32 of the Land Acquisition Act, directing that the compensation money awarded shall be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or if such purchases cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit, and we direct that the payment of interest, rent or other proceeds of any such investment be made to the respondents as the persons for the time being entitled to the land. The appeal is allowed with costs.

Appeal decreed.

1901 *December* 21.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ABU SAYID KHAN (DEFENDANT) *v.* BAKAR ALI AND ANOTHER (PLAINTIFFS).*

Muhammadan law—Waqf—Waqf of money held to be valid.

Held, that according to the Muhammadan law a waqf of movable property may be validly constituted. *Fatima Bibee* v. *Ariff Ismailjee Bham* (2) dissented from.

IN the suit out of which this appeal arose, the plaintiff claimed, as heir to one Fakhr-ud-din, deceased, first, a declaration that he was such heir; and secondly, a declaration that a document called a deed of endowment, dated the 10th of March, 1892, and registered on the 11th of March, 1892, was null and void, and had no effect as against the plaintiff. After the filing of the plaint, one Abu Sayid Khan, the mutawalli of the endowed property, was added as a defendant, the suit having been originally brought against Ahmadi Begam, the widow of Fakhr-ud-din alone. At a subsequent date, the original plaintiff having died, the names of his two sons, Bakar Ali and Muzaffar Ali, were substituted in the plaint, and the plaint was amended

* First Appeal No. 276 of 1898 from a decree of Babu Bepin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 30th June 1898.

(1) Weekly Notes, 1899, p. 96. (2) (1881) 9 C. L. R., 66.

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by the addition of a prayer for a further declaration that "the appointment of Abu Sayid Khan as a mutawalli being totally null and void, he has no right to the property in dispute." There were other reliefs claimed, but these are not material for the purposes of this report.

The Court of first instance (Subordinate Judge of Cawnpore) decreed the plaintiff's claim in part. It found that the plaintiffs were not the only heirs of Fakhr-ud-din, but that the property of Fakhr-ud-din, which was not subject of a valid waqf, was inherited by the plaintiffs along with Ahmadi Begam. As to the waqf, it found that the claim was not maintainable, so far as the immovable property therein included was concerned, but that, inasmuch as movable property could not, under the Muhammadan law, be made the subject of a waqf, the waqf so far was invalid, and the plaintiffs were entitled to it with Ahmadi Begam.

The defendant, Abu Sayid Khan, the mutawalli, appealed to the High Court against that part of the decree which declared the waqf-namah, so far as it related to the movable property dealt with thereby, to be invalid.

Mr. *Karamat Husain* and Maulvi *Gulam Mujtaba*, for the appellant.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondent.

BANERJI and AIKMAN, JJ.—This is the appeal of the defendant in the suit which gave rise to first appeal No. 187 of 1898, decided by us to-day. The only question which we have to consider in this appeal is, whether a waqf of movable property is valid under the Muhammadan law. The appropriator Fakhr-ud-din included in the deed of waqf executed by him a sum of Rs. 11,000, which he had deposited with a firm in Cawnpore. The deed contains the following provisions in regard to the disposal of the said sum:—"Rs. 5,000, out of the endowed sum of Rs. 11,000, will be spent in constructing a mosque with shops at a proper place. The income of the shops will, according to the opinion of the mutawalli (Superintendent), be applied towards the expenses of the said mosque, *i. e.*, on account of Imam (one who leads at prayer) and Muazzin (one who calls for

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prayer), &c., and the mutawalli will construct a pacca well where it is required. The remaining amount out of the endowed sum of Rs. 11,000 and also the money which may remain after defraying all the aforesaid expenses out (of the income) of the endowed property through the good management of the mutawalli (Superintendent) shall all of it be kept in safe custody; and, it having been accumulated, shall be applied in purchasing proper immovable property, which shall be added to the endowed property. This practice will always continue. The profits of the newly purchased property, as well as the property itself, shall be regarded as endowed property, and shall be applied in charitable and pious purposes recognized by the Muhammadan law as mentioned above. The mutawalli (Superintendent) shall also pay (money) to the Hajis (pilgrims) out of this very income according to his own opinion."

It was contended on behalf of the plaintiffs that a waqf of such property is wholly void, and this contention has found favour in the Court below. The learned Subordinate Judge, while pointing out that the opinion of the Muhammadan lawyers on this point was not unanimous, followed a ruling of the Calcutta High Court, *Fatima Bibee* v. *Ariff Ismailjee Bham* (1). That ruling, no doubt, supports the conclusion arrived at by the learned Subordinate Judge, and, as far as we have been able to ascertain, it is the only reported case on the question which we have to determine.

The case referred to was one in which shares in two companies at Rangoon had been made the subject of waqf. It was contended that such an endowment was invalid according to Muhammadan law. Wilson, J., in disposing of the plea, made the following observations:—"Property of this nature is modern in origin, and the old text can only be applied by way of analogy. But there does not seem to me much difficulty in arriving at a conclusion. Land, according to all the authorities, may be appropriated. And the power has been, it is universally agreed, extended to certain other kinds of property, though the exact degree of the extension is a matter in difference among the authorities. But it is agreed that it does not apply to such things

(1) (1881) 9 C. L. R., 66.

as perish in the using, under which head money appears to be included. And if money cannot be appropriated, it seems to me clear that the possibility of receiving money hereafter in the form of dividends cannot be." He therefore held the *waqf* to be invalid. The correctness of this ruling has been questioned by Mr. Justice Ameer Ali, in his work on Muhammadan law, p. 271, 2nd edition, where he remarks, after setting forth the authorities of Muhammadan law on the subject, that these authorities were evidently not pointed out to the learned Judge who decided the case of *Fatima Bibee* v. *Ariff Ismailjee Bham*. The learned counsel on both sides have addressed to us very able and erudite arguments, and have brought to our attention a number of authorities of Muhammadan law in addition to those referred to in Mr. Justice Ameer Ali's book. We have carefully considered those authorities. The conflict between them is bewildering. Some assert that such an endowment as the present is absolutely void; others, that it is valid when customary; and others again—and these are in the majority—that it is valid without any restriction. Not only is there a conflict between different jurists, but we find different and irreconcilable opinions attributed to the same jurists by different commentators. On page 267 of his Digest of Anglo-Muhammadan Law, Sir Roland Wilson observes:—"Authorities are conflicting as to money * * *, but the better opinion seems to be that it can be appropriated." After a long and careful consideration of the texts we have arrived at the same conclusion. Under the Muhammadan law, perpetuity is a necessary condition of a valid waqf: in other words, such things as perish in the using (to use Mr. Justice Wilson's expression), cannot be appropriated. Some of the Muhammadan authorities were of opinion that a condition of perpetuity could not attach to money, and that consequently money could not form the subject of a valid waqf. Others again, such as Zafar, held that no such objection could be offered to a waqf of money. We quote the following passage from Fatwa Qazi Khan, which is pronounced by Morley to be a work of equal authority with the Hidaya:—"It is related from Zafar that if a man should make a waqf of *dirhams* it would be lawful. On being questioned how that could be, he

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replied that the *dirhams* could be given in *Muzarihat* (partnership in which one partner supplies capital, and the other labour), and the usufruct thereof be devoted to the purposes of the waqf." (Fatwa Qazi Khan, Volume IV, p. 309). The same appears to have been the opinion of Zuhri, as will appear from the following extract from the book Umdat-ul-Kari, a commentary on Sahib-ul-Bukhari by Allama Aini, Volume VI, p. 516:—"Zuhri was asked whether a man who, having dedicated a thousand *dinars* in the way of God, made them over to his slave, a tradesman, for investment in some trade, and who made the usufruct thereof a *sadaka* (charity) to the poor, and to the relatives, could lawfully eat anything out of the usufruct of the said thousand *(dinars)*, even if the usufruct had not been given in charity to the poor, he replied that he could not eat anything out of it." The author of Durri-Mukhtar was also of the same opinion, as the following extract shows:—"And, as is also valid the waqf (appropriation) of every 'movable' designedly made, 'in which it is customary' among the people 'like spades and axes', but also *dirhams* and *dinars*. I say that an order was, on the other hand, issued to the Qazis (Judges) to give orders for it, *i. e.*, for the waqf of *dirhams* and *dinars*, as is mentioned in the *maruzat* of Mufti Abu Sand."

Different views are attributed to Imam Muhammad. According to some he held that the waqf of movable was valid where such endowment was customary, but according to the Mujtaba he held it valid without any restriction. The opinion of Abu Yusuf, as well as of the author of the Hidaya, was against such an appropriation.

The decision of the question is not by any means free from difficulty; but we are of opinion that the preponderance of authority is in favour of the view that such an endowment is good, and this view is reconcilable with the principle that perpetuity is a necessary condition of a valid waqf. This is the only question which we have to consider in this appeal.

For the reasons set forth we allow the appeal, and varying the decree of the Court below, we dismiss the suit with costs here and in the Court below.

Appeal decreed.

1901
December 21.

Before Mr. Justice Banerji and Mr. Justice Aikman.

LALI (DEFENDANT) *v.* MURLIDHAR (PLAINTIFF).*

Limitation—Act No. XV of 1877 *(Indian Limitation Act), sch. ii, art.* 119 *—Adoption — Suit for possession of immovable property, plaintiff claiming as adopted son, his title as such having been denied by defendant more than six years before suit—Construction of document—Document of a testamentary nature—Declaration made in wajib-ul-arz by the sole proprietor of a village as to his wishes respecting the devolution of the property after his death.*

Held, that art. 119 of the second schedule to the Indian Limitation Act, 1877, did not apply to a suit for possession of immovable property in which the plaintiff claimed as the adopted son of the last male owner of the property, and in which the plaintiff's adoption was denied by the defendant, and the plaintiff himself alleged that his right as adopted son had been interfered with more than six years before the institution of his suit.

Basdeo v. *Gopal* (1), *Ganga Sahai* v. *Lekhraj Singh* (2), *Ghandharap Singh* v. *Lachman Singh* (3), *Natthu Singh* v. *Gulab Singh* (4), *Lala Parbhu Lal* v. *Mylne* (5), *Jagannath Prasad Gupta* v. *Runjit Singh* (6), *Padajirav* v. *Ramrav* (7), *Fannyamma* v. *Manjaya Hebbar* (8), and *Harilal Pranlal* v. *Bai Rewa* (9), followed. *Inda* v. *Jehangira* (10), *Parvathi Ammal* v. *Saminatha Gurukal* (11) and *Shrinivas* v. *Hanmant* (12) dissented from. *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (13), *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (14) and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (15) distinguished.

The sole proprietor of a certain village caused the following entry to be recorded in the village wajib-ul-arz:—

"I am the only zamindar in this village. I am a Marwari Brahmin. Seven years ago I adopted my sister's son, Murli. He is my heir and successor *(Malik)*. If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son. If more than one son be born to me, the property would be equally divided among them, including the adopted son, as brothers. I have two wives now. They will receive their maintenance from him (Murli)."

A son was born to the person making this declaration, but he died before the plaintiff's suit was instituted.

As to the adoption of Murli, it was found that, although Murli had been brought up by his alleged adoptive father, and more or less treated by him as

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*First Appeal No. 160 of 1897 from a decree of Maulvi Syed Muhammad Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 18th June 1897.

(1) (1886) I. L. R., 8 All., 644.
(2) (1886) I. L. R., 9 All., 253.
(3) (1888) I. L. R., 10 All., 485.
(4) (1895) I. L. R., 17 All., 167.
(5) (1887) I. L. R., 14 Calc., 401.
(6) (1897) I. L. R., 25 Calc., 354.
(7) (1888) I. L. R., 13 Bom., 160.
(8) (1895) I. L. R., 21 Bom., 159.
(9) (1895) I. L. R., 21 Bom., 376.
(10) Weekly Notes, 1890, p. 241.
(11) (1896) I. L. R., 20 Mad., 40.
(12) (1899) I. L. R., 24 Bom., 260.
(13) (1886) I. L. R., 13 Calc., 308.
(14) (1892) I. L. R., 20 Calc., 487.
(15) (1894) I. L. R., 22 Calc., 609.

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his son, it was not satisfactorily proved that there had been any valid adoption, even if such adoption were legally possible.

Held that the declaration in the wajib-ul-arz above cited amounted to a testamentary declaration of the wishes of the proprietor of the village, and that the person described therein as the adopted son was entitled by virtue of it to half of the village. The description of the devisee as an adopted son was treated as a mere mis-description, which ought not to affect what appeared to be the real intention of the testator. *Fanindra Deb Raikat* v. *Rajeswar Dass* (1) and *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

BANERJI and AIKMAN, JJ.—The suit which has given rise to this appeal was brought by the respondent to recover possession of property which originally belonged to one Dhanraj, who died on the 3rd of April, 1885. Dhanraj left surviving him two widows, Musammat Lali, the appellant before us, and Musammat Sundar, now deceased, and a son by Musammat Lali, named Nand Lal, who is also dead. The property is now in the possession of Musammat Lali. The plaintiff alleges that he was adopted by Dhanraj in Sambat 1927, corresponding to 1870-71, and was brought up and maintained by him. He also alleges that at the settlement of 1877, Dhanraj made a will, which he caused to be recorded in the village administration paper, to the effect that on his death the plaintiff should be his heir, and that if a son should be born to him (Dhanraj), the son and the plaintiff should hold the property in equal shares. He states that after the death of Dhanraj, the defendant did not allow the plaintiff's name to be entered in the revenue papers and got her own name entered, and two years afterwards she turned him out of the house of Dhanraj. He claims the property on the strength of the adoption alleged by him, and also on the basis of the will referred to above. The defendant denies the adoption set up by the plaintiff, denies that Dhanraj made the will relied upon by the plaintiff, and asserts that the plaintiff, being the sister's son of Dhanraj, could not be legally adopted by him. She further contends

(1) (1885) L. R., 12 I. A., 72; at p. 89. (2) (1876) L. R., 3 I. A., 253.

that the claim is barred by limitation under article 119 of schedule ii of the Limitation Act. The learned Subordinate Judge has decreed the claim, finding in favour of plaintiff upon all the questions raised in the suit. The parties are Bohra Brahmins, and it is conceded that as the plaintiff is the sister's son of deceased Dhanraj, his adoption is invalid according to Hindu Law, as recently held by their Lordships of the Privy Council in *Bhagwan Singh* v. *Bhagwan Singh* (1). The plaintiff, however, asserts that by the custom prevailing among Bohra Brahmins, the adoption of a sister's son is valid and legal. As evidence upon that point was not taken in the lower Court by reason of the Full Bench ruling of this Court in *Bhagwan Singh* v. *Bhagwan Singh* (2), which was binding on the Court below at the time when the case was decided by that Court, but which has since been overruled by the Privy Council, it was necessary to refer an issue to that Court in the question of the custom referred to above. Evidence upon that issue has now been adduced by the parties at great length, and the finding of the Court below is before us. We shall refer to this finding and the evidence in a subsequent part of this judgment.

The first question which we have to determine in this appeal is whether article 119 of schedule ii of the Indian Limitation Act is applicable to the case. There can be no doubt that if that article applies the claim is beyond time, the plaintiff's right as adopted son having, according to his own allegation, been interfered with in 1887, that is, two years after the death of Dhanraj, and the present suit having been brought on the 26th of September, 1896.

The question as to whether article 119 is applicable to a suit of this nature is by no means free from difficulty, and the rulings of the different High Courts as to the applicability of that article and the cognate article 118 are conflicting. We have in support of the appellant's contention the ruling of this Court in *Inda* v. *Jehangira* (3), the decision of the Madras High Court in *Parvathi Ammal* v. *Saminatha Gurukal* (4), and the recent Full Bench decision of the Bombay High Court in *Shrinivas*

(1) (1898) I. L. R., 21 All., 412.
(2) (1895) I. L. R., 17 All., 294.
(3) Weekly Notes, 1890, p. 241.
(4) (1896) I. L. R., 20 Mad., 40.

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v. *Hanmant* (1). On the other hand, as opposed to the view adopted in those cases, we have the rulings of this Court in *Basdeo* v. *Gopal* (2), *Ganga Sahai* v. *Lekhraj Singh* (3), *Ghandharap Singh* v. *Lachman Singh* (4), *Nathu Singh* v. *Gulab Singh* (5), the decisions of the Calcutta High Court in *Lala Parbhu Lal* v. *Mylne* (6), and *Jagannath Prasad Gupta* v. *Runjit Singh* (7), and the earlier decisions of the Bombay High Court in *Padajirav* v. *Ramrav* (8), *Fannyamma* v. *Manjaya Hebbar* (9), and *Haribal Pranbal* v. *Bai Rewa* (10). In all the cases last-mentioned it was held that articles 118 and 119 can only apply to suits the sole object of which is to declare the validity or invalidity of an adoption, and that a suit for possession of property will be governed by the rule of limitation prescribed for such a suit, even though the question of the validity of an adoption may arise in it and have to be decided. The Courts that have taken an opposite view have considered themselves bound by certain decisions of the Privy Council. If there were any clear ruling of the Privy Council on the matter, we should, of course, be bound to follow it. But we are unable to find in any of the decisions referred to any clear pronouncement of opinion which places the matter beyond doubt, and which would justify us in departing from the view of law taken by this Court in all the cases in which the question has been considered, with the exception of one. It is noticeable that one of the Judges who decided the case of *Inda* v. *Jehangir* (11), was a party to the earlier case of *Basdeo* v. *Gopal* (2), in which an opposite view was taken. We shall now refer to the cases decided by the Privy Council, which were relied on by the appellant, and which formed the basis of the decisions of the Madras High Court, and the latest decision of the Bombay High Court. The first is the case of *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* (12). The Limitation Act applicable to that case was Act No. IX of 1871, the language of article 129, schedule ii of which differs materially from that of articles 118 and 119 of

(1) (1899) I. L. R., 24 Bom., 260.
(2) (1886) I. L. R., 8 All., 644.
(3) (1886) I. L. R., 9 All., 253.
(4) (1888) I. L. R., 10 All., 485.
(5) (1895) I. L. R., 17 All., 167.
(6) (1887) I. L. R., 14 Calc., 401.
(7) (1897) I. L. R., 25 Calc., 354.
(8) (1888) I. L. R., 13 Bom., 160.
(9) (1895) I. L. R., 21 Bom., 159.
(10) (1895) I. L. R., 21 Bom., 376.
(11) Weekly Notes, 1890, p. 241.
(12) (1886) I. L. R., 13 Calc., 308.

schedule ii of Act No. XV of 1877. In that case no doubt their Lordships of the Privy Council held that article 129 applied indiscriminately to suits for possession of land, and to suits of a declaratory nature; but they remarked that in the Limitation Act of 1877, which superseded the Act then under discussion, the language is changed, and they go on to observe:—"Whether the alteration of language denotes a change of policy or how much change of law it affects are questions not now before their Lordships." It is thus clear that in that case their Lordships expressly refrained from pronouncing an opinion as to the effect of the alteration in the law made by the Act we have to construe. The next case decided by the Privy Council is *Mohesh Narain Munshi* v. *Taruck Nath Moitra* (1), which was a case in which it was held that the law of limitation applicable was the Act of 1871. It is true that Lord Shand, in delivering the judgment of the Judicial Committee, observes with reference to the alteration of language in the Act of 1877:—"It seems to be more than doubtful whether, if those were the words of the statute applicable to the case, the plaintiff would thereby take any advantage." That no doubt, as an expression of opinion by the highest tribunal, is entitled to great respect, but it seems to us to stop short of deciding the question now raised and not to afford a sufficient justification for departing from the course of rulings which exist in this Court on the point, more specially as the effect of that observation was considered in *Nathu Singh* v. *Gulab Singh* (2). The third case decided by their Lordships of the Privy Council is *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar* (3). In that case the counsel for the appellant argued that the plaintiff's suit was time-barred under article 118 of schedule ii of Act No. XV of 1877. In disposing of that contention Lord Shand observes:—"The appellant's counsel, founding on section 118 of the schedule to the Limitation Act, argued that the limitation of six years from the date of the alleged adoption of the appellant barred the suit. It was maintained that the suit was one in effect to obtain a declaration that the adoption of the appellant was invalid or had never in fact been made, and that six

(1) (1892) I. L. R., 20 Calc., 487. (2) (1895) I. L. R., 17 All., 167.
(3) (1894) I. L. R., 22 Calc., 609.

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years had elapsed after the alleged adoption had become known to the respondent before the suit was instituted. If the adoption was really made by Bhuina Chaudhrain of a son to herself, and not to her husband, which the High Court has held to be the true construction of the deed of adoption produced, the plea of limitation could have no application in this suit which relates entirely to the husband's estate. But, in the opinion of their Lordships, there is another ground, in respect of which also this defence clearly fails, *viz.*, that it has not been proved that the alleged adoption did become known to the respondent till the death of Bhuina Chaudhrain, which occurred within two years of the institution of the suit." The Bombay High Court considered that this was a conclusive decision by their Lordships in favour of the view that article 118 applies to a suit for possession. With all deference to the learned Judges of that Court, we are unable to hold that this judgment of the Privy Council conclusively decides the question. As we understand the judgment of the Privy Council, the argument of the counsel was met by setting forth two reasons, either of which, assuming article 118 to be applicable, would dispose of the plea. We cannot infer from the mere absence of a distinct statement that article 118 was inapplicable, that the question of its applicability was authoritatively decided. It must be remembered that the period of limitation for a suit relating to adoption was twelve years under article 129, schedule ii of Act No. IX of 1871. Had the Legislature intended to cut down the ordinary period of twelve years' limitation fixed for suits for possession of immovable property to a term of six years in suits for possession in which the question of the validity of an adoption arises we should have expected it to give effect to its intention in unmistakable language. Following therefore the decisions of our own Court and of the Calcutta High Court, particularly the case of *Jagannath Prasad Gupta* v. *Runjit Singh* (1), in which the question of the applicability of article 119 to a suit like the present was considered, we hold that the respondent's suit is not barred by limitation.

We have now to consider the next plea urged on behalf of the appellant, namely, that the respondent Murlidhar was never, in fact, adopted by Dhanraj. The lower Court has found upon the

(1) (1897) I. L. R., 25 Calc., 354.

evidence that the adoption is proved. As regards the oral evidence in support of the adoption, it is, in our opinion, meagre and unsatisfactory, and standing by itself, quite insufficient to satisfy us that any ceremony of adoption was ever performed. The adoption is said to have taken place on Basant Panchmi, Sambat 1927, corresponding to 25th of January, 1871. The first witness called to prove the adoption was one Pokhar Das Bohra, a resident of the Muzaffarnagar district. Dhanraj, we may mention, was a resident of the town of Kosi, in the district of Muttra. The witness, when giving his evidence on the 3rd of March, 1897, stated his age to be forty-two years, so that at the time of the alleged adoption he must have been between fifteen and sixteen years of age. He himself stated in cross-examination that he could not say whether, at the time of the alleged adoption, he was ten or twelve years' old, or more or less than that. His story is, that he was then going on a pilgrimage to Kosi, that he stopped at Dhanraj's house in the evening, and that the adoption took place the following day. If his story is to be believed the necessary ceremony of adoption was performed. It appears that he received no invitation to be present at the adoption, but that he casually arrived at Dhanraj's house at the time when the ceremony was to be performed. He never visited Dhanraj's house after that occasion. He had at the time no elder relative with him, but only a servant. It appears to us highly improbable that a lad of his age should go forth on a pilgrimage by himself. Although he gives a circumstantial and detailed account of the adoption, exhibiting a marvellous memory as to events said to have taken place twenty-six years before the time he was giving evidence, his testimony is not at all convincing to our minds.

The next witness is one Pirthi Raj, a resident of the Aligarh district. This witness was no relation of the parties. He was not invited to be present at the adoption, but says he went there with his master Radha Kishen. This witness, too, gives a circumstantial account of what took place. He gives the very date on which the adoption ceremony is said to have been performed, but he was unable to say in what year his eldest son was born, or in what year he was married. His evidence is, to our minds, as unsatisfactory as that of Pokhar Das.

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The third witness, Mohan Lal, is a resident of the Muttra district, but of a different pargana from that in which Kosi is situated. He is the first cousin of Baldeo, the plaintiff's natural father. He may therefore be supposed to be interested in supporting the plaintiff's case. He has made many confused and conflicting statements, and we do not regard him as a person on whose testimony we can place any reliance.

The next witness, Hargobind, is a resident of the Aligarh district, about thirty-five miles from Kosi. He gives the date of the adoption, and explains as the reason why he remembers the date—that he had noted the date of his invitation upon a paper. But no such paper was produced. It appears that the family property of this witness was sold in execution of a decree and purchased by Dhanraj, and it is probable as suggested that owing to this he would bear no friendly feeling towards Dhanraj's family, and has therefore come forward to give evidence for the plaintiff in this case.

The only other witness to the adoption is one Nathu Ram. He was in the serivce of Dhanraj for fifteen years. This witness was employed to cook his food and to write up his account-books. He left the service of the family after Dhanraj's death, because, according to his account, he was not on friendly terms with the karinda. These are the five witnesses called to prove the adoption. It is noticeable that, although one or two hundred guests are said to have been present at the time of the adoption, including residents of Kosi, not a single witness from Kosi has been called, although it is proved that some at least of those witnesses are alive and might have been called. We may mention that a number of witnesses who are residents of Kosi, some of whom are relatives of the family of Dhanraj, and of a higher social position than any witness for the plaintiff, have sworn that no such adoption took place, that they heard of no such ceremony being performed, and that had any such ceremony been performed, they would certainly have been invited, and have known of it. What tells more than anything against the plaintiff's case, is the conduct of the plaintiff himself and of his natural father Baldeo. It has been stated at the outset that Dhanraj's younger wife Lali gave birth to a son Nand Lal about

two years before Dhanraj's death. If an adpotion had taken place, the adopted son would have been entitled to a share in Dhanraj's property on his death. But we find that the name of Nand Lal alone, under the guardianship of the two widows of Dhanraj, was entered in the revenue papers as succeeding to the valuable estate of Dhanraj. Again, when Nand Lal died two years afterwards, the name of Lali alone—the other widow having died—was entered as in possession of the estate. On neither of these occasions was any claim put forward on behalf of the plaintiff to this valuable estate. At the time of the first mutation of names Baldeo, the natural father of the plaintiff, was alive, and had he, as a matter of fact, given one of his sons in adoption to Dhanraj, his brother-in-law, he surely would have taken some steps to protect his son's interests. At the time of the second mutation of names Baldeo was dead, but the plaintiff had then attained majority, and he had elder brothers. None of them asserted any claim in opposition to Musammat Lali. There was another occasion in 1887 on which the plaintiff's rights as an adopted son, if he had any, might have been, but were not, asserted; that is, when the mutation of names took place in regard to a property which had been usufructuarily mortgaged to Dhanraj. Not only was no claim put forward on any of these occasions by, or on behalf of, the plaintiff as the adopted son of Dhanraj, but we find that when the plaintiff's natural father Baldeo died, the plaintiff's name was entered as succeeding to Baldeo's property in the same way as the names of his three brothers (*vide* p. 21 of the appellant's first book). Had the plaintiff been validly adopted by Dhanraj, he would have ceased to have any claim to his natural father's property. This conduct of the plaintiff and of his relations, for which no explanation has been offered, seems to us to indicate strongly that they were conscious of the infirmity of his title, and confirms us in the distrust we cannot help entertaining as to the truth of the statements of the five witnesses to whom we have referred above.

Had it not been for certain documents to which we will now allude, we would not have had the slightest hesitation in holding that the plaintiff had failed to prove that any formal adoption had taken place. The most important of those documents is an

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extract from the village administration paper (printed at page 34 of the respondent's book) of mauza Daidna, a village owned by Dhanraj. This administration paper, which was prepared at the time of settlement in 1877-78, contains the following statement purporting to have been made and signed by Dhanraj :—"I am the only zamindar in this village. I am a Marwari Brahman. Seven years ago I adopted my sister's son, Murli. He is my heir and successor (*Malik*). If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son. If more than one son be born to me, the property would be equally divided among them, including the adopted son, as brothers. I have two wives now. They will receive their maintenance from him (Murli)." As regards this document, the case of the defendant was, that it was not the deed of Dhanraj, and that the statement was not actually made by Dhanraj himself, but by the plaintiff's natural father Baldeo, who, it is said, acted for some time as Dhanraj's agent. We entirely agree with the Subordinate Judge that the defendant has failed to substantiate this allegation. We see no reason whatever to doubt that it is a genuine statement made by Dhanraj himself before the settlement officer. As to the importance of the document, there can be no question. Dhanraj asserts categorically that seven years previously he had adopted the plaintiff Murli. Had the evidence for the plaintiff in support of the adoption been of a more satisfactory character, this statement of Dhanraj himself would have afforded the strongest corroboration that an adoption had taken place. But looking to the unsatisfactory nature of the oral evidence, and the unexplained equivocal conduct of the plaintiff and his relations to which we have referred, we cannot look upon this wajib-ul-arz as conclusive. We say this, having regard to our common knowledge of the vague notions entertained as to what is necessary for a valid adoption. It is sometimes considered that the execution of a deed is enough ; some times it is thought that it is sufficient if the child is brought up and treated as a son. We see no reason to doubt that the plaintiff was brought up by Dhanraj in his house, investiture with the sacred thread and marriage ceremonies were there performed, and that in all respects he was treated by Dhanraj as his son, at any

rate before a son was born to him. It is quite possible, therefore, that when Dhanraj speaks of having adopted his sister's son, he may be referring to his having taken him into his house and treated him as his son. This would explain the absence of stronger evidence to prove the performance of the ceremony of adoption, and would account for the conduct of the plaintiff and his relations after Dhanraj's death, to which we have alluded above.

The other documents relied upon by the plaintiff are three mortgage-deeds, two of which were executed by one Asa Ram in 1873, and the third by Baldeo and Musammat Sahib Kunwar in 1880. These documents were executed in favour of Dhanraj and Murlidhar. In two of the documents Murlidhar is described as the adopted son of Dhanraj. Our observations with regard to the wajib-ul-arz apply with equal force to these documents. Much was made by the respondent of the fact that the executant of two of the documents was one Asa Ram, who was a near relation of Dhanraj, and might have had some chance of succeeding to his property. Asa Ram was examined as a witness, and he stated that he did not know that the name of Murli had been mentioned in the deeds as the son of Dhanraj. It is somewhat difficult to believe this; but if Dhanraj wished the name of Murli to appear in the document as his son or adopted son, it is not likely that the person borrowing money from him would object. On a review of the whole evidence, we can come to no other conclusion than that the plaintiff has failed to prove by credible evidence that the ceremonies necessary to a valid adoption were performed, and on this issue we cannot agree with the lower Court. This finding relieves us of the necessity of determining whether a custom exists among Brahmans of the class to which the parties to this suit belong by which the adoption of a sister's son is regarded as valid. If it were necessary to express an opinion on the point, we should have no hesitation in agreeing with the conclusion at which the learned Subordinate Judge has arrived after an exhaustive and careful consideration of the mass of evidence adduced by both parties. We agree with him that the evidence adduced by the plaintiff falls far short of establishing a custom which would override the ordinary rule of Hindu law, according to which such an adoption as that set up by the plaintiff is invalid.

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The only question that remains to be considered is the effect of the statement made by Dhanraj in the wajib-ul-arz of the village of Daidna, which we have set forth above. It is contended on behalf of the plaintiff that this document is of a testamentary nature. Although in his plaint the plaintiff claimed to be entitled to the whole of the property under the terms of this document, his counsel admitted here, and indeed he could not do otherwise, that in the event of his failure to establish the adoption he could not under that document claim more than half of the property. For the appellant it was contended that this was not a testamentary document, and even if it were held to be of the nature of a will, there was no bequest to the plaintiff, apart from, or independent of, the adoption; in other words, that the bequest to the plaintiff was conditional on the adoption standing good. We are of opinion that the document is of a testamentary nature. It provides for what is to happen in the event of a son being born to the testator, and makes a bequest to the plaintiff of a larger share of the property than he would be entitled to under the Hindu law. Assuming that there had been a valid adoption, the plaintiff would under that law have been entitled, upon the birth of a son to Dhanraj, to one-fourth of his property, and not to the half share to which Dhanraj declares he will succeed. We have now to consider whether this bequest by Dhanraj was contingent upon the adoption of Murli being valid. In other words, to use the language of their Lordships of the Privy Council in the case *Fanindra Deb Raikat* v. *Rajeswar Dass* (1), the question is whether the mention of the plaintiff as an adopted son is merely descriptive of the person who took under the gift or whether the assumed fact of his adoption is not the reason and motive of the gift, and indeed a condition of it. In such a case the intention of the testator is what has to be looked to. The present case is somewhat similar to the case of *Nidhoomoni Debya* v. *Saroda Pershad Mookerjee* (2). The effect of the will in that case according to their Lordships' view, was as follows:—"I declare that I give my property to Kaibullo whom I have adopted." It was held that it was a gift by the testator to a designated person,

(1) (1885) L. R., 12 I. A., 72; p. 89. (2) (1876) L. R., 3 I. A., 253.

and that it was immaterial whether the adoption was a valid one or not. We may also refer to the following passage at page 89 of the judgment in the case reported in L. R., 12 I. A., p. 72:—"The distinction between what is descriptive only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstance. If a man makes a bequest to his lawful wife 'A B,' believing the person to be his lawful wife, and he has not been imposed upon by her, and falsely led to believe that he could lawfully marry her, and it afterwards appears that the marriage was not lawful, it may be that the legality of the marriage is not essential to the validity of the gift. Whether the marriage was lawful or not may be considered to make no difference in the intention of the testator." The principle of this ruling applies to the present case. Here we have a designated person, namely, Murlidhar. To this person Dhanraj bequeathed half of his property. It is true he describes him as his adopted son, and it may be, that he was under the impression that he was a validly adopted son. But, as stated above, he gives him more than a validly adopted son would get. This is an indication that the adoption was not the reason or motive of the bequest. There is no evidence to show that any deception was practised upon Dhanraj. It is unnecessary to refer to all the cases that were cited in argument by counsel on both sides. Every case must be decided with due regard to the language of the document in question and the surrounding circumstances. In the present case we arrive at the conclusion that it was Dhanraj's intention to make a bequest in favour of the plaintiff of a half share, and that this bequest was not contingent upon the adoption being in all respects a valid adoption.

The result is that we allow the appeal in part, and, varying the decree of the court below, we decree in plaintiff's favour for half of the property claimed. The parties will pay and receive costs in both Courts in proportion to their failure and success.

Decree modified.

MISCELLANEOUS CIVIL.

1901
December 12.

Before Mr. Justice Knox and Mr. Justice Blair.

NORTH-WESTERN COMMERCIAL BANKING CORPORATION, THROUGH BABU RAGHUBIR SARAN, OFFICIAL LIQUIDATOR—(APPELLANT), *v.* MUHAMMAD ISMAIL KHAN—(OPPOSITE PARTY).*

Act No. IX of 1887 *(Provincial Small Cause Courts Act) schedule ii, clause* (18)*—Small Cause Court suit—Jurisdiction—Suit relating to a trust—Suit to recover money paid to legal practitioner to institute suits, but not so expended.*

Held, that a suit in which the plaintiff claimed from the defendant the refund of certain moneys alleged by the plaintiff to have been paid to the defendant, a legal practitioner, for the purpose of instituting certain suits, but not to have been so expended, was a suit which was within the cognizance of a Court of Small Causes, and was not a suit relating to a trust within the meaning of clause (18) of the second schedule to Act No. IX of 1887.

THIS was a reference under section 646B of the Code of Civil Procedure, made by the District Judge of Meerut, upon an application to revise an order of the Judge of the Cantonment Court of Small Causes, returning a plaint for presentation to the proper Court.

The plaintiff alleged that three separate sums, amounting in all to Rs. 382-11, had been paid to the defendant, who was a barrister at that time practising in Meerut, for the purpose of filing certain suits, but that the defendant had never filed the suits for which the money was paid, and the money still remained in deposit with him. The plaintiff had on two occasions demanded the return of the said money, but the defendant had not paid it. The plaintiff therefore claimed payment of the sum named with interest, allowing a set off of Rs. 37-10, which had been deposited by the defendant with the bank of which the plaintiff was the Official Liquidator.

The defendant pleaded *inter alia* that "the suit as laid in the plaint relates to a trust and does not lie in the Small Cause Court."

The Judge of the Court of Small Causes returned the plaint for presentation to the proper Court, being of opinion that the suit was not cognizable by a Court of Small Causes with reference to clause (18) of the second schedule to Act No. IX of 1887.

* Miscellaneous No. 145 of 1901.

1901

NORTH-WESTERN COMMERCIAL BANKING CORPORATION, THROUGH BABU RAGHUBIR SARAN, OFFICIAL LIQUIDATOR v. MUHAMMAD ISMAIL KHAN.

Against this order the plaintiff applied in revision to the District Judge, who, being of opinion that the view taken by the Judge of the Court of Small Causes was incorrect, referred the question to the High Court.

The following opinion was pronounced :—

KNOX and BLAIR, JJ.—Unfortunately we have not had the benefit of any argument addressed to us, nor of any authorities cited before us. The only paper we had before us is the reference made by the learned District Judge. We hold that the suit as instituted was not a suit which fell within the purview of clause (18) of the second schedule to the Provincial Small Cause Court's Act, and it was a suit, so far as this matter is concerned, not excepted from the cognizance of the Court of Small Causes.

This is our answer to the reference.

APPELLATE CIVIL.

1898
January 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

ADHAR SINGH (PLAINTIFF) *v.* SHEO PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 244—Sale in execution of decree—Compromise —Suit to set aside compromise and sale.

In execution of a money decree the decree-holders attached and brought to sale the interest of their judgment-debtor in a certain village, and themselves purchased it. An objection to the sale was raised by the judgment-debtor, and while such objection was pending, the judgment-debtor's son is said to have entered into a compromise, whereby it was agreed that the decree-holders should take the village in full satisfaction of their decree, though it had, in fact, been sold, for only about three-quarters of the decretal amount, and that the sale should be confirmed on those terms.

The judgment-debtor subsequently filed a suit against the decree-holders, asking for a declaration that the said compromise and the confirmation of sale were collusive and invalid, and were null and void, and ineffectual as against the plaintiff.

Held, that such a suit was barred by the operation of section 244 of the Code of Civil Procedure. *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (1) referred to.

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* First Appeal No. 290 of 1898 from a decree of Babu Bipin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 18th October 1898.

(1) (1892) L. R., 19 I. A., 166.

1898

ADHAR SINGH v. SHEO PRASAD.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Pandit *Sundar Lal*, (for whom Babu *Durga Charan Banerji*), for the respondents.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Cawnpore dismissing the plaintiff's suit, which was brought to have it declared that certain proceedings, relating to a compromise and the confirmation of the sale of property known as mauza Bahripur, were collusive and invalid, and were taken without any authority on the part of the plaintiff, and that the sale should be set aside. The defendants in the suit are decree-holders, who obtained a simple money decree against the plaintiff, and in execution attached and purchased at an auction the plaintiff's interest in the lands in question. An objection to the sale was raised by the judgment-debtor on the grounds of irregularity in the conduct and publication of the sale. Whilst these proceedings were pending, the judgment-debtor's son, Bijai Singh, is alleged to have entered into a compromise with the decree-holders whereby it was arranged that the decree holders should take the village in question in full satisfaction of their debts instead of at the sale price, and that the sale should be confirmed on these terms. The amount of the decree was Rs. 12,755, and the sale price was Rs. 9,500. By the compromise the present plaintiff obtained a considerable advantage. He, notwithstanding this, alleges that his son had no authority to enter into the compromise, and seeks, in consequence, to have the sale set aside. The learned Subordinate Judge has held that the suit is barred by the provisions of section 244 of the Code of Civil Procedure, and we are of opinion that his view on this point is correct. The question which has arisen between the parties is clearly one relating to the execution, discharge or satisfaction of a decree, and being such, it is not open to the plaintiff to take proceedings by an independent suit. This was laid down in the case of *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (1) by their Lordships of the Privy Council; and, as their Lordships say,

(1) (1892) L. R., 19 I. A., 166.

"is a view to be commended, inasmuch as it is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible." For these reasons we are of opinion that the suit cannot be maintained, and that the decree of the Subordinate Judge dismissing the suit must be upheld. We, accordingly, dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

1898 *January* 15.

KANHAIA LAL AND ANOTHER (DEFENDANTS) *v.* RAJ BAHADUR (PLAINTIFF).*

Hindu law—Mitakshara—Joint Hindu family—Mortgage by father—Suit for sale on mortgage, son not being made a party—Subsequent suit by son for declaration that his share is not liable under the mortgage decree against father—Further plea that mortgage-debt was contracted for immoral purpose—Act No. IV of 1882 *(Transfer of Property Act), section* 85.

The mortgagees to a mortgage of joint family property made by the father in a joint Hindu family, consisting of father and son, brought a suit for sale against the father without making the son a party, and obtained a decree for sale of the entire property mortgaged. The son sued the mortgagees for a declaration that his share was not bound by the decree, firstly, because he was not made a party to the mortgagee's suit for sale, and secondly, because the mortgage-debt was contracted by his father for immoral or impious purposes. It was found in that suit that the mortgagees had at least constructive notice of the son's existence, and ought to have made him a party to their suit for sale. But it was also found in the son's suit that the original mortgage debt of the father was not contracted for immoral or impious purposes.

Held, that although the son might have been entitled to the decree sought by him, had he contented himself with raising the first plea only; yet, inasmuch as he himself had raised the issue of the immorality of the debt, which had been found against him, and as that was the only issue which could in any subsequent suit be raised as between himself and the mortgagees, he was not in this suit entitled to any decree save a decree for redemption if he should desire to redeem. *Lala Suraj Prosad* v. *Golab Chand* (1) followed.

Held also, that the mere fact that the son had asserted his right to a moiety of the mortgaged property, and had brought the suit above referred to, did not work a partition of the property or create any separate title in the son *Padarath Singh* v. *Raja Ram* (2) referred to.

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* First Appeal No. 262 of 1898 from a decree of Babu Bipin Behari Mukerji, Additional Subordinate Judge of Cawnpore, dated the 21st September, 1898.

(1) (1901) I. L. R., 28 Calc., 517 : at p. 531. (2) (1882) I. L. R., 4 All., 235.

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KANHAIA LAL v. RAJ BAHADUR.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* (for whom Babu *Durga Charan Banerji*), for the appellants.

Babu *Jiwan Chandra Mukerji* (for whom Babu *Devendra Nath Ohdedar*), for the respondent.

STANLEY, C. J., and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Cawnpore declaring that the plaintiff Raj Bahadur was the owner of a moiety of a zamindari share of 8 annas in village Daheli Sujanpur, and that his share of 4 annas was not liable to sale under a decree in suit No. 98 of 1896, dated the 8th of July 1893. After the filing of the appeal, Raj Bahadur died, and his widow, Musammat Rup Rani, has been brought upon the record as respondent in his place. The facts are shortly as follows:—The defendant Kashi Prasad, father of the plaintiff, acquired the share of the property in dispute as ancestral property. He, on the 3rd of January, 1887, mortgaged the property in favour of one Tapeshri Prasad, to secure a sum of Rs. 1,400, and subsequently on the 9th of February, 1892, he mortgaged it in favour of Jagdish Prasad and Baij Nath to secure a sum of Rs. 845. The defendants, Kanhaia Lal and Bishambhar Nath, are the heirs of Jagdish Prasad and Baij Nath, both of whom are dead. On the 24th of January, 1893, Tapeshri Prasad, the first mortgagee, brought a suit upon his mortgage without impleading the plaintiff, who upon his birth had become entitled to a moiety of the mortgaged property, and he obtained a decree on the 30th of March, 1893. Jagdish Prasad and Baij Nath instituted a suit on the basis of their mortgage of the 9th of February, 1892, against Kashi Prasad, and also against the first mortgagee, Tapeshri Prasad, and likewise did not implead the plaintiff. They obtained a decree on the 8th of July, 1893, and paid off the debt of the first mortgagee, Tapeshri Prasad. Jagdish Prasad and Baij Nath having died, their heirs, Kanhaia Lal and Bishambhar Nath, the appellants, took out execution of the decree of the 8th of July, 1893, and caused the entire 8 annas share in the village to be advertised for sale on the 20th of May, 1898. The plaintiff thereupon brought the present suit, alleging that Jagdish Prasad and Baij Nath had knowledge of his interest

in the property, and yet did not make him a party to the suit which they had instituted, contrary to the provisions of section 85 of the Transfer of Property Act, and claiming a declaration that his share in the property was not liable to be sold in execution of the decree of the 8th of July, 1893. He also alleged that the amount of the decree was spent on immoral purposes, an allegation which was interpreted by the parties and treated by them and the Court as raising the issue, whether or not, the mortgages of the 3rd of January, 1887, and the 9th of February, 1892, were tainted with immorality, and therefore were not binding on the plaintiff. This issue was determined in favour of the defendants, the plaintiff having failed to give any proof in support of his allegation. The Court below, however, held that there was gross negligence on the part of the mortgagees in not making proper inquiry as to whether or not the mortgagor, Kashi Prasad, had a son, and therefore must be held to have had notice of the plaintiff's interest in the property within the meaning of section 85 of the Transfer of Property Act. We think that the evidence fully justified the finding by the learned Subordinate Judge that the mortgagees had, or must be deemed to have had, notice of the plaintiff's interest at the time they brought their suit, and we do not propose to interfere with this finding.

This being so, if the plaintiff had confined himself to this issue, the decree in his favour would have been unassailable, inasmuch as he was not impleaded in either of the mortgage suits. He did not, however, do so, but went further and set up the case that the mortgages were tainted with immorality, and that therefore he in no case was liable in respect of the debts secured by them. This issue having been decided against him, the appellants contend that he must abide by the decision of the Court upon this issue and cannot re-open the question, and that as the moneys secured by the mortgages are found to have been borrowed by his father for legitimate purposes, he as a pious son is liable to satisfy his father's debts, and so is not aggrieved by the sale of his share of the property, and is not entitled to the relief which he sought in this suit.

The contention, which has been put forward on his behalf, is that the question as to the alleged taint of immorality in the

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mortgage transactions was not relevant to the determination of the issue arising under section 85 of the Transfer of Property Act, and that having succeeded on the latter issue, he was entitled to obtain from the Court the declaration which was claimed in the plaint. If the plaintiff himself had not raised the question of immorality the case would have been determined solely upon the other issue: but he chose to raise this question, and it was one of the issues which were settled and decided by the Court. Now that it has been determined against him, it is too late for him or his representatives to resile from the position which he took up. He and the substituted plaintiff must abide by the consequences of his action.

It has been found, then, by the lower Court that the mortgage debts were not contracted for an immoral purpose. This being so, they were debts of Kashi Prasad, which his son, the plaintiff, was, by Hindu law, under a pious obligation to pay; they were debts which the ancestral property was ultimately liable to discharge, and being such, it would seem to follow that any alienation by Kashi Prasad made for the purpose of discharging them, upon, at all events, reasonable terms, would be substantially an unimpeachable transaction. Was the plaintiff then, who was under an obligation to pay the debt which is due to the appellants, and in respect of which they have obtained a decree for sale of the mortgaged property, entitled, despite the fact that the debt (to recover which the suit was instituted) has been found not to have been contracted for immoral purposes, to a declaratory decree that a moiety of the mortgaged property belonged to him, and that his share was not liable to be sold in execution under the appellants' decree? We think not, unless he was prepared to redeem the mortgaged property. He who seeks equity must do equity. Before the plaintiff could obtain a declaration from the Court that his share of the mortgaged property is not liable to be sold in execution of a decree for a debt for which he was responsible, and which the mortgaged property was liable to discharge, he must be prepared to act equitably and discharge the debt. This question was recently considered in the case of *Lala Suraj Prosad* v. *Golab Chand* (1).

(1) (1901) I. L. R., 28 Calc., 517, at p. 531.

In that case, a father, as *karta* of a joint Mitakshara family, consisting of the father and a son, by a mortgage bond hypothecated the joint property. The mortgagee sued the father alone on the bond without making the son a party, although he had notice at the time of the son's interest in the mortgaged property, and he obtained a mortgage decree. The son objected to the execution of the decree on the grounds as here:—(1) That the mortgage debt had been contracted for immoral purposes, and (2) that he not having been made a party to the mortgage suit, the decree in that suit was not binding upon him. It was found at the hearing that the mortgage debt had not been contracted for immoral purposes. On appeal under section 15 of the Letters Patent, against the decision of Ghose, J., differing from that of Harington, J., on the question as to whether the minor plaintiff, not having been made a party to the mortgage suit, was bound by the decree in that suit, having regard to the provisions of section 85 of the Transfer of Property Act, it was held by Sir F. Maclean, C. J., Sale and Brett, JJ., dissenting from the judgment of Ghose, J., that the provisions of section 85 of the Transfer of Property Act being compulsory, the minor son ought to have been made a party to the mortgage suit. This is the view which had been previously taken by this Court—see *Bhawani Prasad* v. *Kallu* (1). It was further held that the issue, whether the debt was incurred for illegal or immoral purposes, having been decided on its merits between the plaintiff and the defendant in the present suit adversely to the minor plaintiff, it must now be taken as between him (the plaintiff) and the mortgagee to have been finally determined; and under the circumstances, the validity of the mortgage ought not to be allowed to be contested in another suit, the plaintiff being in the same position in which he would have been had he been made a party to the mortgage suit, and that the only right which the minor plaintiff had was the right of redemption.

In the course of his judgment Sir F. Maclean observes:—"The only other question is, what are the present rights and remedies of the minor plaintiff? It is urged for the appellan that, inasmuch as the decree in the mortgage suit, by reason of

(1) (1895) I. L. R., 17 All., 537.

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his not having been a party to that suit, is not binding upon him, he is entitled to a declaration to that effect; and we have been told with an almost cynical frankness, that the advisers of the minor propose to leave the mortgagee to bring another suit to enforce his mortgage, and in that suit the minor will again set up that the debt was incurred for illegal and immoral purposes. It has not been suggested that there is any other possible defence open to the minor, except the defence that the money was borrowed for illegal or impious purposes. But that very issue has been raised and tried in the present suit, and has been decided adversely to the minor plaintiff, and must now be taken as between him and the mortgagee to have been finally and conclusively determined.

"If the minor had been a party to the original mortgage suit, and it had been found in that suit that the mortgage-debt was not contracted for immoral or illegal purposes, as has now been found, and there were no other defence to the mortgagee's claim, what would have been the rights of the minor in that suit? Taking the mortgage to be valid, as it has been found in this suit to be, his only right, so far as I can see, would have been a right to redeem."

So likewise in this case it has been established on an issue raised by the plaintiff, Raj Bahadur, himself that the mortgage debts were not contracted for immoral purposes. This being so the plaintiff would have had no answer to the mortgagee's claims if he had been impleaded in the mortgage suits, as he was liable to pay the mortgage-debts, and it would not have been equitable or right for the Court to give any aid to him in his resistance to the execution of a decree which was substantially a just decree, unless at least he was prepared to act equitably and pay off the mortgage debts and redeem the property. Raj Bahadur having died childless pending this appeal, his interest in the property has passed to his father, Kashi Prasad, the mortgagor, subject, it may be, to his widow's right of maintenance out of it.

It has been argued on behalf of the respondent that the effect of the suit brought by Raj Bahadur was to create a partition of the property, so that on his death his share passed,

not to his father as survivor, but to his widow, the respondent. We cannot accede to this agreement. Raj Bahadur and his father remained joint until the death of the former; there was no partition or division of shares between them, nor was even a partition claimed by Raj Bahadur in the present suit. The mere fact that he asserted his right to a moiety of the property and brought the present suit did not create any separate title in him—see *Padarath Singh* v. *Raja Ram* (1). It is clear that the mortgagor, Kashi Prasad, cannot resist the sale of any part of the mortgaged property. The appellants, while not admitting any right in the substituted respondent (widow of Raj Bahadur) to redeem the mortgages, have expressed their willingness to give her an opportunity of redeeming them if she be so advised. We shall provide for this in our decree. We accordingly allow this appeal and set aside with costs the decree of the lower Court, in so far as it declares that the property in dispute in this appeal is not liable to be sold under the appellant's decree. *Provided that* if the substituted plaintiff-respondent shall, within a period of three months from this date, that is, on or before the 15th of April next, pay to the appellants or into Court the amount which shall be found due for principal, interest, and costs under the decree of the 8th of July 1893 (including also the costs of this appeal), then, and in that case, we direct that the appellants shall deliver to the substituted plaintiff-respondent all documents in their possession or power relating to the mortgaged property, and for that purpose we direct that execution of this decree shall be suspended for the period of three months from this date. But if the substituted plaintiff-respondent shall fail to make such payment within the period mentioned above, then, after the expiration of that period, the appellants will be entitled to bring to sale the property, the subject of this appeal, in execution of the decree of the 8th July 1893.

Appeal decreed.

(1) (1882) I. L. R., 4 All., 235.

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January 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DURGA SINGH (PLAINTIFF) *v.* BISHESHAR DAYAL AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib-ul-arz—Sale of zamindari share and appurtenances—Indigo factory not appurtenant—Court fee—Act No. VII of 1870 *(Court Fees Act), section* 7, *sub-section V(b)—Land—Valuation of suit—Limitation—Civil Procedure Code, section* 54.

When a Court fixes a time under clause *(a)* or *(b)* of section 54 of the Code of Civil Procedure, it must be a time within limitation, and section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. *Jainti Prasad* v. *Bachu Singh* (1) followed. *Moti Sahu* v. *Chhatri Das* (2) referred to.

On the sale of a share in zamindari property, buildings, such as indigo factories, will not ordinarily pass to the vendee along with the zamindari share sold, unless there is distinct evidence of the user of such buildings as part and parcel of, or as appurtenant to, the zamindari. *Abu Hasan* v. *Ramzan Ali* (3), *Bankey Lal* v. *Damodar Das* (4) and *Salig Ram* v. *Debi Parshad* (5) referred to.

The term "land" as used in the Court Fees Act, 1870, does not include buildings. A claim, therefore, for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to Government, must be valued, and court fees paid thereon, according to the value of the buildings constituting the factory, and not according to the value of the site. Such buildings as constitute an indigo factory would fall within the meaning of the term "houses" as used in the Court Fees Act.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellant.

Mr. *A. E. Ryves*, Babu *Jogindro Nath Chaudhri* and Maulvi *Ghulam Mujtaba*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Aligarh dismissing the plaintiff's claim.

The claim was made by the plaintiff as a co-sharer for pre-emption of 15 biswas zamindari property of mauza Godha, consisting of the thoks of Gokul Singh and Hira Singh, each comprising 7½ biswas, an indigo factory, and the wells, buildings

* First Appeal No. 301 of 1898 from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Meerut, dated the 14th September 1898.

(1) (1892) I. L. R., 15 All., 65.
(2) (1892) I. L. R., 19 Calc., 780.
(3) (1882) I. L. R., 4 All., 381.
(4) Weekly Notes, 1900, p. 31.
(5) (1874) 7 N.-W. P. H. C. Rep., 38.

and apparatus appertaining to it in thok Gokul Singh, the share in another indigo factory occupying one pakka bigha and one biswa of land, a grove measuring 6 pakka bighas and 15 biswas, houses and shops, etc., and all rights in respect of the property upon payment of Rs. 45,500, or such other sum as the Court might adjudge to be the amount of the consideration which was paid by the defendant vendee. The claim is based upon a custom of pre-emption which is thus described in the wajib-ul-arz:—"Every proprietor has power to transfer his share, but he shall first offer it to a near sharer, and on his refusal, to another pattidar. If no one in the village be willing to take it, he shall transfer it to any person he may like, but should any person allege a fictitious price to deprive a pre-emptor of his right, the matter shall be decided by a reference to arbitration or by order of the Court." In the plaint the suit is valued for the purposes of jurisdiction at Rs. 45,500, and for the purposes of the Court fee the value of the property is stated as follows, namely, Rs. 7,521-0-8, five times of Rs. 1,504-3-4, the annual amount mentioned in the record of rights, (by which is clearly meant the annual revenue Rs. 147-0-8) the arrears of rent due by tenants, Rs. 6,389-0-4, the estimated value of both the indigo factories and the garhi, and Rs. 1,200, the estimated value of the grove, total Rs. 15,258-9.

In her written statement Bibi Hamid-un-nissa, the vendee, alleged that the Court fee paid by the plaintiff was incorrect, and that the value of the suit stated by him was wrong; also she alleged that the plaintiff had not in any event any right of pre-emption in regard to the indigo factories, the houses, the grove and the shops, etc., also that the value of the indigo factories and the houses, etc., as stated by the plaintiff was wrong and excessive, and that the sale was made at the price of Rs. 55,500, and that too after the plaintiff was requested to purchase the property and had refused to do so, and that so he had lost his right of pre-emption. The defendant vendees in their written statement say that the real price of the property was Rs. 55,500.

The following issues were settled at the trial:—

(1) Has sufficient stamp duty been paid?

(2) Is the claim barred by tim ?

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(3) Was the sale in favour of the vendee concluded after the plaintiff's refusal to purchase?

(4) What was the sale consideration actually paid?

The Court, after recording the evidence of the plaintiff's witnesses, found that the sum paid for Court fees was insufficient, and by order of the 20th of June, 1886, directed that the deficiency should be made good by the following day. This order was complied with by the plaintiff and the deficiency paid. It was the value which the Court placed upon one of the indigo factories which we shall term the new indigo factory which necessitated the payment of an additional Court fee. The suit was instituted on the 23rd of September, 1897, within the period of limitation, but the payment of the deficiency in stamp duty was made beyond the period of limitation, so that if the latter date is to be taken as the date of the institution of the suit, the claim would be statute-barred according to a ruling of a Full Bench of this Court. When a Court fixes a time under clause *(a)* or clause *(b)* of section 54 of the Code of Civil Procedure, it has been held that it must be a time within limitation, and section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits; *Jainti Prasad* v. *Bachu Singh* (1). This decision has not been followed in the Calcutta High Court in the case of *Moti Sahu* v. *Chhatri Das* (2). In that case it was held by Prinsep and Banerji, JJ., that the date of the institution of a suit should be reckoned from the date of the presentation of the plaint, and not from the date on which the requisite Court fees are subsequently paid so as to make it admissible as a plaint. Whatever our individual views may be upon this subject we are bound to follow the decision of a Full Bench of this Court. The learned Subordinate Judge in this case, in his judgment after a review of the evidence, found that the plaint was insufficiently stamped at the date on which it was presented, and that the additional stamp duty ordered to be paid, and paid by the appellant was not paid within the period of limitation, and so that the plaint was originally invalid, and only became valid after the suit had become barred by limitation. Upon this finding he dismissed the plaintiff's claim. The only ground of appeal which

(1) (1892) I. L. R., 15 All., 65. (2) (1892) I. L. R., 19 Calc., 780.

has been supported before us by the learned advocate for the appellant is that the plaint was all along sufficiently stamped, and that the Court below erred in regard to the basis upon which the valuation for the purposes of the Court Fees Act ought to be made. His contention is that the entire subject-matter of the suit was *land paying annual revenue to Government* within the meaning of section 7, paragraph *5(b)* of the Court Fees Act, and that under this section the amount at which the plaintiff was bound to value the relief sought by him was five times the revenue payable to Government, and no more. It is admitted that the revenue is not permanently settled, so that if the property, the subject-matter of the suit, only comprised land within the meaning of the section of the Court Fees Act above mentioned, the suit was apparently sufficiently valued by the plaintiff. The plaintiff, it is to be observed, claimed a right to pre-empt the new indigo factory and the buildings, etc., appertaining to it and also a share in another indigo factory, a *garhi* (fort) and a grove, and the contention of the respondents is that these properties are separate and distinct from, and would not pass as appurtenant to, the zamindari property, and also that the factories are not land, as this expression is used in the Court Fees Act, but houses, and should have been valued as houses for the purposes of the Act; that, as a matter of fact, the new factory was claimed by the plaintiff independently of, and as distinct from the zamindari property, and that consequently the plaintiff was bound to value these properties, as he in fact purported to do, at their market value, and that as he undervalued them his plaint was in the first instance invalid, and only became valid when the deficiency in the Court fees was made good, at which time the suit was statute-barred. It appears from the plaint that the plaintiff himself valued the factories, the fort, and the grove separately from the revenue-paying property, and paid Court fees in respect of these properties. He valued, as we have mentioned, the indigo factories at Rs. 6,389-0-4 and the grove at Rs. 1,200, but the Subordinate Judge found that the old indigo factory was worth Rs. 400, that the grove was worth Rs. 2,000, and that the new indigo factory was worth Rs. 10,000. On the part of the plaintiff it is admitted

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that he claimed a right to pre-empt the entire new indigo factory and not merely a share in it. The case made by his learned advocate is that the plaintiff's claim was for pre-emption of a share of the zamindari property consisting of the two thoks of Gokul Singh and Hira Singh, and whatever appertained to this share, and nothing else, and that the indigo factories, fort and grove form part of the zamindari property and passed as appurtenant to it, and that the sites of the factories were, under the subsisting land settlement, actually charged with and paying annual revenue to Government, and so the subject-matter of the suit was entirely *land* within the meaning of section 7, para. 5*(b)*, and not houses. The word "land" as used in the Court Fees Act, it is contended on behalf of the plaintiff, includes everything upon the land, such as groves, houses, factories, etc. If this contention be well-founded, then, instead of having paid insufficient Court fee on the presentation of his plaint, the plaintiff paid an excessive amount. The fact that in his plaint the plaintiff himself set a separate value and paid Court fees upon the factories, fort and grove is not consistent with the suggestion that his claim was only in respect of the zamindari property. But let us for the moment pass over this inconsistency, and consider, in the first place, whether or not, as a matter of fact, the factories, etc., would pass as being appurtenant to the zamindari. From the language of the deed of sale of the 12th of October 1896, made in favour of the defendant, Bibi Hamid-un-nissa, and also the land settlement record which we have inspected, it is clear that the factories, fort and grove in question were within the area of the two thoks, and were conveyed to her along with the 15 biswas zamindari share. The deed purports to convey the 15 biswas zamindari share constituting the two thoks, together with an indigo factory situate on a specified piece of land, that is the new indigo factory, and a share in another indigo factory, also described as to its situation, also a garhi or fortress, grove, etc., and all the interest and adventitious rights appertaining to or existing in the said share, etc., including the arrears of rent due by the tenants. The factories, fort and grove were conveyed apparently as being appurtenant to the 15 biswas zamindari share purchased by this defendant.

It is said, however, on the part of the respondents that a factory, fort and grove cannot be regarded as part and parcel of, or as appurtenant to a zamindari, and would not pass as such, so that the right of pre-emption did not attach to them, but that inasmuch as the plaintiff in his plaint claimed the right to pre-empt them, he was bound to pay Court fees in respect of them, to be computed according to their market value under sub-section *(e)*, para. 5 of section 7. The case of *Abu Hasan* v. *Ramzan Ali* (1) was relied on on behalf of the appellant. In this case it was held that a killa (fort) passed to a purchaser of the rights and interests in a village of one Kadir Ali Khan a zamindar. Kadir Ali Khan had purchased a village, and with it the killa, some 30 years before the suit was instituted. The killa had always been occupied by him and his family as a residence, and, it was held, would seem to have belonged to him *qud* zamindar, and that as the zamindari rights and interests were brought to sale in 1873, and purchased by the plaintiff, the presumption was that the killa was included, unless there was anything to show that it was excluded expressly or by implication, as to which there was no evidence. This decision does not far advance the plaintiff's case, inasmuch as it was based on the fact that the killa was occupied by the former owner *qud* zamindar as a dwelling-house. In the present case there is no evidence to show and it is most unlikely, that the indigo factories were held by the owner *qud* zamindar. The case of *Banke Lal* v. *Damodar Das* (2) was also relied on by the plaintiff's advocate. In this case the late Sir Arthur Strachey, Chief Justice, held that certain kothis or houses and out-houses, which were included in the area of zamindari property, passed upon an execution sale to a purchaser of the rights and interests of the zamindar in a village. The kothis had been specifically mentioned in the application for execution and in the warrant of attachment, and were found by the Court to have been actually attached. The learned Chief Justice held that, in the absence of evidence to the contrary, a kothi or other building situate within a zamindari area is included in, and passes with, the zamindari; that no doubt the contrary may be shown by evidence, that is to say, evidence of the

(1) (1882) I. L. R., 4 All., 381. (2) Weekly Notes, 1900, p. 31.

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circumstances connected with the acquisition, construction or user of the building, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been so severed or held so separately from it as to form a separate and distinct property of the zamindar. In that case there was no evidence to show for what purpose or in what manner either of the kothis was used at any time up to the sale. In the case before us such cannot be said, so far at least as regards the new indigo factory, for it admittedly was, and is, used as a factory, and was conveyed in its entirety as such to the respondent Bibi Hamid-un-nissa. It was apparently treated as being separate and distinct from the zamindari property, in which the vendor had only a share. On behalf of the respondents the case of *Salig Ram* v. *Debi Parshad* (1) was strongly relied on as showing that a right of pre-emption does not extend to a factory, bungalow or garden situate on the land comprised in a thok. In that case the claim was based on a clause in the wajib-ul-arz which was as follows:—"Every shareholder is at liberty to transfer by sale or mortgage his own share or the land appertaining thereto." A Division Bench, consisting of Turner and Brodhurst, JJ., held that the right of pre-emption was only intended to extend to the ordinary rights of a zamindar in the village, and to such buildings in the village *as are held ordinarily with such zamindari rights, and that it does not extend to such properties, as for instance a family residence or an indigo factory.* A bungalow and garden were accordingly excluded from the claim for pre-emption. Upon the facts disclosed in the present case we are unable to discover any grounds for holding that the new indigo factory, which was purchased by Bibi Hamid-un-nissa, formed any part of the zamindari property, or that it passed to her as such, or as appurtenant thereto. Upon this question we cannot accede to the argument which has been advanced on behalf of the appellant.

We now come to the remaining portion of the argument of the learned advocate. His contention is, that the sites of the factories being assessed and chargeable with Government revenue, as appears to be the case, the land upon which the factories stand with the factories upon it are, for the purposes of the Court Fees

(1) (1874) 7 N.-W. P. H. C. Rep., 38.

Act, to be treated as "land" merely, and valued as such under sub-section *(b)*, para. 5 of section 7, and not also under sub-section *(e)* of the same section. It becomes necessary for the determination of this question to consider the meaning and significance of the word "land," and the word "houses" as used in the Court Fees Act. The word "land" in its wider signification would no doubt include not only the surface of the ground, but also everything on or under it, for *cujus est solum ejus est usque ad cœlum*. We are not aware that there is any definition of the word "land" as used in the statutes in this country such as is found in the English statute 13 and 14 Vic., Cap. XXI, section 4. In the Court Fees Act the word would seem to be used in a restricted sense, for the Act provides a distinct mode of ascertaining the amount at which relief should be valued according as the subject-matter of the suit is land, or houses or gardens. If the subject-matter of the suit is land, there are two modes of computing the Court fee according as the land is revenue-paying or not, and if it be a house or garden another and distinct mode of computation is provided. The word "land" appears to be used in the section in contradistinction to houses or gardens. In suits, such as the present suit, to enforce a right of pre-emption, the computation is directed to be made in accordance with the value of the land, houses or gardens, in respect of which the right is claimed, such value to be computed in the modes subsequently prescribed. Now in this case the plaintiff admittedly claims the right of pre-emption of the whole of one indigo factory as also a share in another. We may exclude from our consideration the old factory, which is in ruins and of little or no value. It was the amount, namely, Rs. 10,000 at which the new factory was valued, which necessitated the payment of the additional Court fee. This factory, it is contended, and we think rightly, should have been valued according to its market value as coming within the meaning of the term houses as used in the Court Fees Act. It was not suggested on the part of the appellant that the word "house" as used in that Act was not sufficiently comprehensive so as to include an indigo factory, and we do not think that such a contention, if it had been raised, woul dhave been tenable. Substantial and permanent buildings, such as constitute a factory, clearly,

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we think, come within the meaning of the expression "houses." In the present case the new indigo factory was built subsequently to the date of the last settlement of the lands in dispute, and the site of it is assessed with Government revenue, but this coincidence cannot, we think, be regarded in determining the true meaning of the section of the Court Fees Act to which we have referred. The substantial subject-matter of the suit, so far as regards the new indigo factory, was not the site of the factory, but the factory itself. If the subject-matter of the suit had been the new indigo factory alone, it seems to us that it could not reasonably have been argued that the Court fee was to be computed according to the amount of revenue payable to Government in respect of the site, and not according to the market value of the buildings, &c.

We are of opinion for these reasons that the plaintiff, when he claimed in his plaint a right to pre-empt the new indigo factory, was bound to value it according to its market value for the purposes of the Court fee, as in fact he did purport to do. Unfortunately he undervalued it and must take the consequences. The case is no doubt a hard one upon him, for he paid the additional Court fee which was required of him only to find that his suit was statute-barred. We must, for these reasons, dismiss the appeal with costs.

Appeal dismissed.

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January 16.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BIRI SINGH AND ANOTHER (PLAINTIFFS) *v.* NAWAL SINGH AND OTHERS (DEFENDANTS).*

Parties to suit—Practice—Suit by some only of several persons entitled to sue, the others being joined as co-defendants.

Where out of several persons who apparently had a right to bring a suit as co-plaintiffs, some only appeared as plaintiffs and joined the others as co-defendants. *Held* that the suit ought not to have been dismissed merely because the plaintiffs failed to show that the persons whom they joined as co-defendants refused to appear with them as plaintiffs. *Pyari Mohun Bose* v. *Kedar Nath Roy* (1) followed. *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (2) referred to.

* First Appeal No. 305 of 1898 from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Mainpuri, dated the 29th September 1898.

(1) (1899) I. L. R., 26 Calc., 409. (2) (1889) I. L. R., 17 Calc., 160.

THE plaintiffs brought the suit out of which this appeal arose to recover the amount alleged to be due to them upon a mortgage, dated the 25th of September 1875, and offering to redeem, if necessary, prior mortgages. The original mortgagees were Lachman Singh and Zalim Singh. Of the two plaintiffs, one, Biri Singh, was the son of Lachman Singh, whilst the other, Nita Ram, was the transferee of the interest of Zalim Singh in the mortgage sued upon. In paragraph 3 of their plaint the plaintiffs stated that the mortgage money had been borrowed by the defendants or their ancestors from "Lachman Singh, the father and leading member of the joint family of the plaintiff Biri Singh and of the plaintiff Nita Ram", and, apparently on the basis of the family being joint, they made defendants to their suit certain members of the family, namely, Bhup Singh, Bijai Singh, Bajan Singh and Kanchan Singh. When the suit, however, came to a hearing, the plaintiffs, on an issue as to whether Lachman Singh ought to have been made a party to the suit, pleaded that the family was separate. As regards Lachman, it was found that he had died, so that that issue became immaterial. The Court of first instance (Subordinate Judge of Mainpuri), however, found that the family was joint, and that the four persons above mentioned ought to have been made plaintiffs in the cause, and because it did not appear that the plaintiffs had given them the option of joining in the suit and that they had refused, he dismissed the suit. In taking this view of the law the Subordinate Judge relied on the case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (1). Against the dismissal of their suit the plaintiffs appealed to the High Court.

Pandit *Sundar Lal* (for whom *Durga Charan Banerji*), for the appellant.

Babu *Jogindro Nath Chaudhri*, Pandit *Moti Lal Nehru*, (for whom Pandit *Tej Bahadur Sapru*) and Babu *Jivan Chandra Mukerji*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Mainpuri dismissing the plaintiff's suit, which was brought to recover the amount due to them upon a mortgage, dated the 25th of September, 1875, and

(1) (1889) I. L. R., 17 Calc., 160.

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to redeem, if necessary, any prior mortgages. The mortgagees in the mortgage-deed are Lachman Singh and Zalim Singh. The plaintiff Biri Singh is the son of Lachman Singh, and Nita Ram is admittedly entitled to the interest of Zalim Singh in the mortgage. The plaintiffs made parties as defendants to the suit, four persons, who are members of their family, namely, Bhup Singh, Bijai Singh, Badan Singh and Kanchan Singh. One of the issues which was framed was an issue as to whether or not the suit could be proceeded with against these defendants, or was it necessary to make Lachman Singh a party to it, the parties at the time the issue was framed being under the impression that Lachman Singh was then alive. As a matter of fact Lachman Singh was then dead, so there was an end to this issue. The learned Subordinate Judge, however, thought fit to consider whether or not, under the circumstances of this case, the plaintiffs could succeed in establishing their claim without having arrayed the four persons above mentioned as plaintiffs instead of as defendants. He found that they and the plaintiffs were members of a joint Hindu family, and relying on the decision in the case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy* (1), determined that the members of the family, who were arrayed as defendants, ought to have been joined as plaintiffs, and, accordingly, that the suit could not proceed. The decision upon which the learned Subordinate Judge relied has been overruled by a Full Bench of the Calcutta High Court, consisting of the Chief Justice and four judges, in the case of *Pyari Mohun Bose* v. *Kedar Nath Roy* (2), in which it was decided, with the concurrence of both of the Judges who decided the earlier case of *Dwarka Nath Mitter* v. *Tara Prosunna Roy*, that where two parties contract with a third party, a suit by one of them making the other a co-defendant ought not to be dismissed merely because the plaintiff has not proved that the co-defendant had refused to join as a co-plaintiff. This case disposes of the authority upon which the learned Subordinate Judge relied. We may observe, however, that it was quite apparent from the written statement which was filed by three of the defendants in question that they disclaimed all interest in the subject-matter of the suit, and

(1) (1889) I. L. R., 17 Calc., 160. (2) (1899) I. L. R., 26 Calc., 409.

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would not willingly have been made plaintiffs to it. We therefore must allow the appeal, set aside the decree, and, as the case has been decided on a preliminary point, we remand it under section 562 of the Code of Civil Procedure to the lower Court, to be replaced on the file of pending cases under its original number in the register, for the determination of the issues which have been left undecided. The costs of this appeal must abide the event.

Appeal decreed and cause remanded.

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January 20.

Before Mr. Justice Knox and Mr. Justice Blair.

PITAM MAL (DEFENDANT) *v.* SADIQ ALI (PLAINTIFF) AND SUGHRA FATIMA AND OTHERS (DEFENDANTS.)*

Award—Appeal from decree based on an award—Civil Procedure Code, section 506—"*All the parties to the suit.*"

Held that the words "all the parties to a suit" in section 506 of the Code of Civil Procedure refer to the succeeding words of the same section "any matter in difference between them in the suit," and would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. *Deo Nandan* v. *Bhirgu Rai* (1).

THIS was a suit for sale upon a mortgage. During the pendency of the suit the plaintiff and the answering defendants agreed to refer the matters in dispute between them to arbitration. An award was pronounced. Subsequently one of the defendants raised objections to the award, but those objections were disallowed, the Court of first instance holding that it was sufficient that the plaintiff and the answering defendants who had entered an appearance were parties to the submission, and that it was not necessary to join those of the defendants who had never appeared in Court at all. The award was made a rule of Court, and a decree passed thereon. Against this decree the objecting defendant appealed to the District Judge. His appeal was dismissed, and he again appealed to the High Court, raising his former objection that the arbitration was invalid, and the consequent award illegal because all the parties to the suit did not consent to

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* Second Appeal No. 870 of 1898, from a decree of L. M. Thornton, Esq., District Judge of Farrukhabad, dated the 6th September 1898, confirming a decree of Rai Anant Ram, Subordinate Judge of Fatehgarh, dated the 23rd December 1897.

(1) Weekly Notes, 1887, p. 215.

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refer the matter in difference to arbitration; and a further ground that the Court of first instance had acted illegally in refusing the appellant's application to summon two of the arbitrators.

Maulvi *Ghulam Mujtaba* (for whom Maulvi *Muhammad Ishaq*), for the appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the respondents.

KNOX and BLAIR, JJ.—A preliminary objection has been raised to the hearing of this appeal, namely, that inasmuch as the decree is in accordance with the award, no appeal lies. In answer to this, two points have been taken. The first is, that inasmuch as all the parties to the suit did not join in the submission, there was no award which could be made the award of the Court; and the second, that the Court before which the award came in the first instance, refused to summon two of the arbitrators in accordance with a request made by Seth Pitam Mal, and so there was no judicial determination, and therefore an appeal lies. In support of the first our attention was called to the case of *Deo Nandan* v. *Bhirgu Rai* (1). The case therein set out does not appear to have been reported in the Indian Law Reports. At first sight this case does seem to be in support of the contention raised, but we prefer to hold that the words "all the parties to the suit" mentioned in section 506, Civil Procedure Code, must refer to the succeeding words, "any matter in difference between them in the suit." In this case the persons who were not parties to the award never put in any appearance in the Court, and so far as we can discover, there was not any matter in difference between them and any other of the persons who submitted the matter in difference between them to arbitration. There is a distinction between "all parties to a suit" and "all the parties to a suit," and the words used in section 506 of the Code of Civil Procedure are "all the parties to a suit." It has been held by the Calcutta High Court that this section refers to all the parties to a suit who are interested. This appears to us to be the proper interpretation. As regards the second point, we are not prepared to hold that simply because two persons were not summoned, there was no judicial determination by the Court. There is the judgment by the Court

(1) Weekly Notes, 1887, p. 215.

which is a judicial determination. There may have been some irregularities preceding it, but what we have really to remember is that, if the decree is in accordance with the award no appeal lies except in so far as the decree is in excess of, or not in accordance with, the award. There was an award, and no plea has been argued before us that the decree was in excess of, or was not in accordance with, the award. The preliminary objection taken prevails, and this appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

1902 *January* 24.

SYEDA BIBI AND ANOTHER (PLAINTIFFS) *v.* MUGHAL JAN AND OTHERS (DEFENDANTS).*

Muhammadan law—Shias—Waqf—Invalid waqf—Condition suspending operation of waqf-namah—Condition that waqf-namah should not take effect until registration.

According to the Shia law it is one of the essential conditions precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month, or the occurrence of the death of the waqf.

Hence where a Muhammadan of the Shia sect executed a waqf-namah in which it was provided that "this deed of waqf shall come into force from the date of its registration, no one shall be at liberty to take any objection, etc.," it was *held* that this condition was repugnant to the doctrine of the Shia law and the waqf was invalid. *Agha Ali Khan* v. *Altaf Husain Khan* (1) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Messrs. *Abdul Raoof* and *Karamat Husain*, for the appellants.

Mr. *W. M. Colvin*, the Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Jaunpur in a suit brought by the plaintiff for the recovery of the property of the late Syed Hasan Ali by right of inheritance, and for a declaration that a

* First Appeal No. 300 of 1898 from a decree of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Jaunpur, dated the 8th September 1898.

(1) (1892) I. L. R., 14 All., 429.

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waqf-namah of the 27th of August, 1886, was invalid, and ineffectual according to Shia law.

Syed Hasan Ali, who belonged to the Shia sect of Muhammadans, on the 27th of August, 1886, executed the deed which has given rise to this litigation. In it, after a recital of the uncertainty of life, the executant, "with a view to earn merit in the next world and to benefit the persons mentioned in this document," made a perpetual waqf "for charitable purposes, and to benefit the persons mentioned" in the document according to the Muhammadan law of the Imamia sect of the whole of his movable and immovable property, with the exception of some small portions of property which he specified, subject to the conditions and details which follow.

The deed then provides in paragraph 1 that from the date of its execution his wife, the defendant Mughal Jan, shall be mutawalli, and that after her death certain members of the family expressly mentioned, and after them the eldest member of the family from generation to generation should be mutawallis. In paragraph 2 there is a declaration that Mughal Jan shall receive during her life the profits of the properties, after deducting the expenses mentioned in paragraphs 3, 4, 5, 6, 7 and 8, and other expenses connected with the management, &c., of the waqf properties, and (3) that after her Syed Aulad Husain, Syed Sarfaraz Husain and Syed Asghar Husain, his nephews, shall receive the profits after deduction of expenses, and that when any of these persons or their male descendants how low so ever, are no longer in existence, the entire profits from the endowed property shall be spent in good deeds and proper charities. Then in paragraphs 3, 4, 5, and 8, provision is made for defraying out of the income of the property the following expenses, *viz.*—

(1) The expenses of majlis as the appropriator used to do.
(2) The expenses of a mosque situate near his house.
(3) The expense of constructing a well.
(4) The feeding of travellers.
(5) The expenses upon his death of holding majlis, recitation of Quran and feeding poor persons.

In paragraph 11 is the following important direction, namely:—"This deed of waqf shall come into force from the date of

its registration; no one shall be at liberty to take any objection, &c." Part of the property of Syed Hasan Ali consisted of mortgage securities, which are not the proper subject-matter of a waqf. The Subordinate Judge held that, save and except in respect of the mortgage securities, the property was validly dedicated and created a waqf, and he dismissed the claim of the plaintiffs save in regard to the mortgaged property. Hence this appeal. Three grounds of objection to the deed have been pressed in argument before us on behalf of the appellants. First, it is said that the waqf is illusory, that the object of it was merely to benefit the widow and the nephews of the waqif, and the male descendants of the nephews for all time, and that it was only after the extinction of male descendants of the nephews that any substantial portion of the property was made available for good deeds and charities; secondly, it was contended that according to Shia law, acceptance of the waqf by the beneficiary must be proved by substantive evidence, that acceptance cannot be a matter of inference merely, and that substantive evidence of the fact was not adduced; and thirdly, it is said that the direction in the deed that the waqf shall only come into force from the date of registration of the deed is fatal to the validity of it, inasmuch as under the Shia law, the operation of a waqf cannot be suspended or made to depend upon some future event. From the view which we hold as regards this last question, it is unnecessary for us to determine the earlier questions which have been discussed.

Amongst the conditions which relate to a valid waqf is the condition "that it must be entirely taken out of the waqif or appropriator himself, so that if the appropriation is restricted to a particular time or made dependent on some quality of future occurrence, it is void" (Baillie's Imamia law, page 218). Quoting from Mafateh, Mr. Shama Churun Sircar in the annotations to his Tagore Lectures of 1874, writes at page 471 as follows:—"Without difference of opinion waqf should be made at once; it cannot be made to depend on the occurrence of an event (in future) unless the same be quite certain and positive." And again at page 472 of the same Lectures, he gives the following illustration of the rule:—"If one should say 'I have appropriated when the beginning of the month should come, or if Zayid will

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arrive, the appropriation would not be valid.'" In this he refers to Sharaya-ul-Islam, pp. 236 and 237.

Mr. Justice Mahmood elaborately reviewed the various texts on this subject in his judgment in the case of *Agha Ali Khan* v. *Altaf Hasan Khan* (1), and, amongst other quotations, gives at p. 466 an extract from the Sharah Lamah Damishkia, which is as follows:—"Besides above mentioned matters *tanjiz* is one of its (waqf's) conditions. Therefore if he (the waqif) has suspended it upon any contingency or quality it is void, except in cases when the contingency already exists, and the waqif (appropriator) is aware of its existence, such as his saying 'I have made this waqf if to-day is Friday,' such as is the rule in regard to other contracts." The learned Judge then observes that "it is clear from these texts that the doctrine of *tanjiz*, which is unanimously approved by the highest authorities of the Shia law, requires as one of the essential conditions precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month or the occurrence of the death of the waqif, *i.e.* the appropriator."

In the present case the appropriator made the waqf to depend upon the happening of a future event, that is, upon the registration of the waqf-namah. One of the conditions of the instrument was that it should only come into force on the date of its registration, that is, that it should have no force or validity unless and until the document was registered. As a matter of fact, the registration was not effected until a week after the execution of the deed had elapsed, so that for one week the operation of the waqf was suspended. There was no obligation on the part of the executant to have the deed registered at all; if he had chosen not to register it during his lifetime, the dedication would have remained incomplete, and the waqf-namah been suspended or left in abeyance. It has been argued by Mr. *Conlan* on behalf of the respondents that there was no suspension of the waqf created by the deed, that the direction that the deed should come into force from the date of its registration was only declaratory

(1) (1892) I. L. R., 14 All., 429.

of the law, inasmuch as the deed could not take effect before registration by reason of the provision of the Registration Act that no document shall affect any immovable property unless it has been registered (section 49, Indian Registration Act). There are two answers to this argument. In the first place, this statement is not strictly accurate, inasmuch as the waqf-namah purports to deal with movable as well as immovable property, and as regards movable property it would operate as from its date without registration. In the second place, as regards immovable property the deed, when registered, would operate from the time from which it would have commenced to operate if no registration had been required, and not from the time of registration (section 47, Registration Act). So that, but for the condition that the deed should only come into force on the date of registration, it would on registration operate as from the day of its execution.

There being this precise direction by the waqif that the endowment is to become effectual only on the happening of an uncertain event, there is nothing in the Registration Act which would make it to operate from the date of execution. If there had been no such direction by the waqif, then according to the Registration Act the deed on registration would have effect from the date of its execution; but such is not the case when, as here, an executant fixes a time from which the deed is to come into force.

But it is further argued that the condition contained in paragraph 11 is repugnant to the direction contained in paragraph 1, namely, the direction that from the date of the execution of the deed Mughal Jan shall be mutawalli of the endowed property, and that there being a repugnancy in the two paragraphs, the first in the case of a deed must prevail. We do not think that there is any such repugnancy as renders it necessary for us to apply the rule of construction which is relied on. The executant by the deed no doubt declares that Mughal Jan shall be the mutawalli from the date of execution, that is, her appointment as such dates from execution; but by the subsequent provision in paragraph 11, her powers and duties are suspended so as to spring into existence only upon registration. Her appointment nominally made on the day of execution, is in effect post-dated by the subsequent direction in the deed.

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Reading the deed then in its entirety, it appears to us to be manifest that the executants intended that the deed should take effect and operate only in case and when it was registered.

For these reasons we think that the alleged waqf is invalid, and not binding on the plaintiffs. We therefore allow the appeal, set aside the decree of the Lower Court, so far as the claim of the plaintiffs was partly dismissed, and we declare that the deed of the 27th of August, 1886, in the pleadings mentioned, was ineffectual to create a valid waqf of the property of the late Syed Hasan Ali, and in modification of the decree of the lower Court we give a decree as claimed with future mesne profits and also costs in both Courts.

Appeal decreed.

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January 30.

Before Mr. Justice Knox and Mr. Justice Blair.

HANUMAN PRASAD AND ANOTHER (APPLICANTS) *v.* BHAGWATI PRASAD AND ANOTHER (OPPOSITE PARTIES).*

Civil Procedure Code, section 596—*Appeal to His Majesty in Council—Decree involving indirectly some question respecting property of the value of ten thousand rupees or upwards.*

When, as in section 596 of the Code of Civil Procedure, it is laid down that in order that an appeal may lie to His Majesty in Council the decree to be appealed from must involve, directly or indirectly, some claim or question to, or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence. It is not enough that the question decided by such decree is a question of title which may possibly affect the title of persons who are not parties to the decree to property not the subject-matter of the suit in which the decree was passed, and concerning the title to which property there is no litigation pending. *Radha Krishn Das* v. *Rai Krishn Chand* (1), *Banarsi Prasad* v. *Kashi Krishna Narain* (2), *Moofti Mohummud Ubdoollah* v. *Baboo Mootechund* (3), and *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (4), referred to.

THIS was an application presented by the respondents in First Appeal No. 48 of 1898, asking for leave to appeal to His Majesty in Council. The suit out of which the appeal in question arose was brought by the present applicants for the recovery of the village of Kot Kamarhya as next reversioners to the estate of

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* Privy Council Appeal No. 1 of 1901.

(1) (1901) I. L. R., 23 All., 415.
(2) (1901) I. L. R., 23 All., 227.
(3) (1837) 1 Moo., I. A., 363.
(4) (1860) 7 Moo., I. A., 548.

one Paltan Singh, who had died in 1822. The defendants to the suit were the successors in title of a transferee from Harnam Kunwari, one of the widows of Paltan Singh. The applicants plaintiffs had succeeded in their suit in the Court of first instance, but on appeal their suit had been dismissed by the High Court, hence the present application. With respect to the requirements of section 596 of the Code of Civil Procedure, it was admitted that the value of the subject-matter of the suit was below Rs. 10,000, and that the value of the matter directly in dispute before His Majesty in Council was also below that sum. But it was contended that the appeal involved indirectly questions respecting property of greater value, inasmuch as the title of other persons having an interest in the village of Kot Kamarhya would be governed by the decision in the proposed appeal, as well as the title of other transferees of other villages belonging to the same estate who traced their title through Harnam Kunwari. With the application was filed an affidavit, showing that the aggregate value of the properties which, it was alleged, would be thus affected indirectly by the result of the appeal was about one lakh and half of rupees. The further facts in connection with this application will be found stated in the judgment in *Bhagwati Prasad* v. *Hanuman Prasad* (1).

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dave*), for the applicants.

Pandit *Madan Mohan Malaviya* (for whom Babu *Satya Chandra Mukerji*), for the opposite parties.

KNOX and BLAIR, JJ.—This is an application for leave to appeal to His Imperial Majesty in Council. The subject-matter of the suit in the Court of first instance was under ten thousand rupees in value, but in an affidavit, which is attached to the application, it is stated that the title to an eight-anna share in mauza Kot Kamarhya of Pandit Hira Nand Chaube and of Pandit Chattardhari Chaube depends on the decision of the same question, and that the title of other purchasers to the rest of the villages mentioned in the schedule annexed to the petition depends on the same question. In this way it is sought to make out that, though the value of the matter directly in dispute is below ten

(1) I. L. R., 23 All., 67; S.C., Weekly Notes, 1900, p. 197

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thousand rupees, yet the decree of this Court involves indirectly questions to or respecting the entire property mentioned in the schedule, which is valued at about 1,50,000 rupees. None of the properties which are said to be affected by the decree of this Court, and which are not in dispute before us, are or have been made the matter of any suit yet instituted. They may or may not hereafter be subject-matters of suits. Our decree may or may not involve, directly or indirectly, a claim or question to, or respecting them. At present all this is a matter of pure conjecture. The application is therefore opposed on the ground that as the value of the subject-matter is not ten thousand rupees this application should be rejected. The question of law, too, which is involved, is not a question of great public or private importance, and it is urged that for these reasons it cannot be held to come within the term "a substantial question of law." In support of this contention reference is made to the case of *Radha Krishn Das* v. *Rai Krishn Chand* (1), and to the case of *Banarsi Prasad* v. *Kashi Krishna Narain* (2). We have examined the question which is said to be involved, and we determine that it is not a substantial question of law within the meaning of the terms of section 596 of the Code of Civil Procedure. We are also of opinion that when it is laid down that the decree must involve, directly or indirectly, some claim or question to or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence and not to suits, if we may so term it, *in gremio futuri*. In this view we are supported by what is stated as the unanimous opinion of their Lordships of the Privy Council in the case of *Moofti Mohummud Ubdoollah* v. *Baboo Mootechund* (3). We may also refer to the observations made in the case of *Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (4). We therefore direct that this application stand dismissed with costs.

Application dismissed.

(1) (1901) I. L. R., 23 All., 415.
(2) (1901) I. L. R., 23 All., 227, p. 231.
(3) (1837) 1 Moo., I. A., 363.
(4) (1860) 7 Moo., I. A., 548.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

MATHURA DAS (DEFENDANT) *v.* LACHMAN RAM AND ANOTHER (PLAINTIFFS).*

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February 2.

Civil Procedure Code, section 244—Execution of decree—Suit for cancellation on the ground of fraud of a sale held in execution of a decree—Proper remedy by application.

Certain judgment-debtors brought a suit against the decree-holders and the auction-purchaser for cancellation of a sale held in execution of a decree, upon the allegation that the sale in question had been brought about by fraud, the decree having in fact been previously satisfied. *Held*, that such a suit would not lie, the plaintiffs' remedy being by application under section 244 of the Code of Civil Procedure. *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (1), *Dhani Ram* v. *Chaturbhuj* (2), *Daulat Singh* v. *Jugal Kishore* (3), *Bhubon Mohun Pal* v. *Nunda Lal Dey* (4) and *Moti Lal Chakrbutty* v. *Russick Chandra Bairagi* (5) referred to.

IN the suit out of which this appeal arose the plaintiffs came into Court under the following circumstances. According to their allegations one Baijnath Prasad, in execution of a decree obtained against them by his father, Dilsukh Rai, had caused certain property of theirs to be advertised for sale. Upon this they sold the property to Sadho Ram and others, and with the proceeds thereof paid off the decree. The decree-holder, on the 28th of February, 1898, acknowledged this payment, and applied to the Court executing the decree that the execution case might be struck off, which was accordingly done. Subsequently the decree-holder again took out execution of the same decree, and caused the said property of the judgment-debtor to be put up for sale on the 20th of February, 1899, and it was sold and purchased by one Mathura Das. The plaintiffs thereupon filed the present suit against the decree-holder and the auction purchaser, in which they asked that sale of the 20th of February, 1899, might be set aside as having been obtained by fraud, and that they might be restored to possession of the property. The defendants objected that the suit did not lie, the remedy of the plaintiffs, if any, being by means of an application under section 244 of the Code of Civil Procedure. The Court of first instance (Officiating Subordinate Judge of Gorakhpur) entertained this

* First Appeal from Order No. 14 of 1901 from an order of F. W. Fox, Esq., District Judge of Gorakhpur, dated the 6th December 1900.

(1) (1892) L. R., 19 I. A., 166.
(2) (1899) I. L. R., 22 All., 86.
(3) (1899) I. L. R., 22 All., 108
(4) (1899) I. L. R., 26 Calc., 324.
(5) (1896) I. L. R., 26 Calc., 326.

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objection and dismissed the suit, refusing to accede to the plaintiffs' suggestion that the plaint should be treated as an application under section 244. On appeal the lower appellate court (District Judge of Gorakhpur) overruled the Subordinate Judge on both points, and remanded the case under section 562 of the Code. From this order of remand the defendant, Mathura Das, appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant.

Mr. *S. S. Singh*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from an order of the District Judge of Gorakhpur, remanding a case under section 562 of the Code of Civil Procedure to the Officiating Subordinate Judge of Gorakhpur for determination upon the merits. The suit was brought for cancellation of a sale deed executed in favour of the appellant Mathura Das, upon a sale had in execution of a decree obtained by two persons, Baij Nath and Dilsukh, against the present appellant. The allegation of the plaintiffs in the suit is, that the sale was fraudulent, the same having been brought about collusively between the parties after the decree had been satisfied. The learned Officiating Subordinate Judge, in a carefully-considered judgment, held that the suit was not maintainable, having regard to the provisions of section 244 of the Code of Civil Procedure, and he accordingly dismissed the suit. He also on an application made to him to treat the suit as equivalent to an application under section 244, refused to do so upon the grounds stated at length in his judgment. There was an appeal from this decree to the District Judge of Gorakhpur, when the learned Judge, after reviewing the authorities, was pleased to overrule the decision of the Officiating Subordinate Judge, and to remand the case under the section to which we have referred. The District Judge appears to have overlooked the later decisions both of the Allahabad High Court, and also of the Calcutta High Court, following upon the judgment of their Lordships of the Privy Council in the case of *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal* (1). In this case their Lordships clearly stated the grounds upon which the Court should act in carrying out the

(1) (1892) L. R., 19 I. A., 166.

provisions of section 244, and expressed disapproval of some of the earlier decisions. The recent cases in this High Court are the case of *Dhani Ram* v. *Chaturbhuj* (1) and the case of *Daulat Singh* v. *Jugal Kishore* (2), and there are the more recent cases in the Calcutta High Court of *Bhubon Mohun Pal* v. *Nunda Lal Dey* (3) and *Moti Lal Chakrbutty* v. *Russick Chandra Bairagi* (4). In these cases effect is given to the principle laid down by their Lordships of the Privy Council, and in the two last mentioned cases it was held that the fact that the purchaser who was no party to the suit was interested in the result of the application, was no bar to the application of section 244, and that an application to set aside a sale on the ground of fraud would come under section 244 of the Code of Civil Procedure, notwithstanding that the purchase was made by a person who was a third party. These authorities abundantly show that the Officiating Subordinate Judge was entirely correct in the view which he took, and that the learned District Judge was in error in reversing his decree. We might also observe that in dealing with the authorities of this Court which were cited before him, the District Judge has entirely misconceived and misinterpreted them.

Upon the other question as to whether the suit might have been regarded as an application under section 244, this was entirely a matter in the discretion of the Officiating Subordinate Judge, who gave it his consideration, and came to the conclusion, in the exercise of his discretion, that the suit ought not to be treated as such an application. We see no reason for interfering with the determination at which he arrived. Accordingly we allow this appeal, set aside the decree of the District Judge, and dismiss the appeal by the plaintiff to him and we restore the decree of the Officiating Subordinate Judge directing that the suit do stand dismissed with costs.

Appeal decreed.

(1) (1899) I. L. R., 22 All., 86.
(2) (1899) I. L. R., 22 All, 108.
(3) (1899) I. L. R., 26 Calc., 324.
(4) (1896) I. L. R., 26 Calc., 326.

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February 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

BANSI LAL AND OTHERS (DEFENDANTS) *v.* DHAPO (PLAINTIFF).*

Act No. 1 of 1872 (Indian Evidence Act), section 44—Res judicata—Evidence—Competence of party against whom a former judgment is set up as constituting res judicata to show that such judgment was obtained by fraud or collusion—Custom—Saraogis—Alleged custom of exclusion of daughters from inheritance to their fathers set up, but not proved.

When a subsisting judgment, order or decree, which is relevant under sections 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside, but it is open to such party, in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Nistarini Dassi* v. *Nundo Lall Bose* (1), *Rajib Panda* v. *Lakhan Sendh Mahapatra* (2) and *Bansi Lal* v. *Ramji Lal* (3) referred to.

Semble that no custom exists in the North-Western Provinces of India amongst the members of the Saraogi community by reason of which females are excluded from inheriting the property of their fathers.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Babu *Durga Charan Banerji*) and Pandit *Baldeo Ram Dave*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Meerut, passed in favour of the plaintiff in a suit brought for recovery of certain zamindari property, and also of a sum of money. The facts briefly stated are as follows:—The property in dispute belonged to one Ishk Lal, the father of the plaintiff, Musammat Dhapo. Ishk Lal died in the year 1884, leaving a widow, Musammat Shama, surviving him, and also two daughters—one a married daughter Jai Dei, and the other the plaintiff, who was unmarried. Musammat Shama died on the 13th of March, 1886, and after her death

* First Appeal No. 303 of 1898 from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Meerut, dated the 11th October 1898.

(1) (1899) I. L. R., 26 Calc., 891. (2) (1899) I. L. R., 27 Calc., 11.
(3) (1898) I. L. R., 20 All., 370.

the defendant, Ramji Lal, who was a brother of Ishk Lal, and Daulat Ram, who was a first cousin of Ramji Lal and father of the defendants Bansi Lal, Shitab Rai, Mul Chand, Tota Ram and Pirbhu Lal, took possession of the property in dispute. Shortly afterwards, in the year 1889, Jai Dei instituted a suit on behalf of herself and the plaintiff against Ramji Lal and Daulat Ram for recovery of the property. Jai Dei, who acted in the suit as next friend of the plaintiff, Musammat Dhapo, was herself a minor of the age of 15 years, and the plaintiff was younger than she. The subject-matter of the suit was referred to arbitration on the 12th of August, 1889, and on the 20th of June, 1890, an award was made which was confirmed by a decree of the 5th of July 1890. By the award the property of Ishk Lal, which was of the value of about Rs. 50,000, was divided between the litigant parties, two sums of Rs. 2,000 each being awarded to the plaintiff, a sum of Rs. 7,500 to Jai Dei, and the balance to Ramji Lal and Daulat Ram. Subsequently Daulat Ram died, and his sons, defendants in this suit, instituted a suit, No. 265 of 1894, against Ramji Lal for partition of the property of Ishk Lal which had been awarded to Daulat Ram by the arbitrators. The plaintiff, Musammat Dhapo, intervened in this suit under section 32 of the Code of Civil Procedure, and contended that neither the plaintiffs nor anybody else had any title to any portion of the estate of Ishk Lal; that she, having been the only unmarried daughter of Ishk Lal at the time of his death, was entitled to the whole of his estate; that the proceedings taken by Jai Dei in the former suit were taken in collusion with Daulat Ram and Ramji Lal and were fraudulent. Whether or not the plaintiff was entitled to intervene in that suit under section 32 of the Code of Civil Procedure is a question which it is unnecessary for us now to determine. The Subordinate Judge entertained her objection and dismissed the suit on the 18th of November, 1895. On appeal the High Court set aside the decree on the ground that the decree of the 5th of July, 1890, could not be treated as a nullity, as it was treated by the Subordinate Judge, unless it was first set aside by a Court of competent jurisdiction. During the pendency of that appeal to the High Court, namely, on the 29th of May, 1896, Musammat Dhapo instituted the present suit against Musammat

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Jai Dei, Ramji Lal and the sons of Daulat Ram, who was then dead, for possession of the property of Ishk Lal which had been acquired by them under the award, alleging that the arbitration proceedings and the decree passed thereon were illegal and void as against her. On the 5th of May, 1898, she applied for liberty to amend her plaint by adding a prayer to have the award and the decree thereon set aside, and leave to do so was granted on the 20th of May, 1898, and the plaint was amended. The defence of the defendants is, first, that the claim is barredby the statute of limitation; secondly, a traverse of the alleged fraud; and, thirdly, that amongst Saraogis, the sect to which the parties belonged, daughters are excluded from inheriting their father's property. The plaintiff only attained majority on the 8th of December, 1893, and it is admitted that the suit was in time at the date of the presentation of the plaint. But the defendants' case is that, so far as the plaintiff sought in her plaint to have the award and decree set aside, her claim is statute barred, inasmuch as it was not raised until the 20th of May 1898. The Subordinate Judge decided the several issues in favour of the plaintiff, and hence the present appeal.

In the first place, it is contended on behalf of the defendants that the amendment of the plaint changed the character of the suit and ought not to have been allowed. Let us see if this is so. In her plaint as it originally stood the plaintiff alleged in the 5th paragraph that Jai Dei, Daulat Ram, and Ramji Lal filed a collusive arbitration agreement on the 12th of August 1889, and that Jai Dei agreed to the arbitration on her behalf. In the 11th paragraph she avers that the arbitration proceedings, the award and the decree thereon are all illegal, ineffectual and null and void against the plaintiff, as was held by the Subordinate Judge in the suit to which we have referred; but that in spite of this the defendants continue in possession of the property in suit without any right; and in the 12th paragraph she alleges that the possession of the property in dispute by the defendants was the result of joint collusive proceedings taken by them during the minority of the plaintiffs in order to deprive her of her right. Then in the prayer she asked, amongst other things, for possession of the property, and also for any other relief to which she

may be justly entitled in the opinion of the Court. From this it appears that in the plaint as it originally stood, allegations of fraud and collusion on the part of the defendants were made in the most clear and distinct terms. Subsequently, however, as we have said, to the institution of this suit the decree of the High Court was passed in suit No. 265 of 1894, in which the learned Judges held that the decree of the 5th of July, 1890, could not be treated as a nullity, and accordingly the plaintiff, it may be, *ex abundanti cautela* applied for and obtained liberty to amend the plaint, and inserted an express prayer that the arbitration award, dated the 20th of June, 1890, and the decree, dated the 5th of July 1890, passed thereon, might be set aside; and also in the body of the plaint in the 4th and 6th paragraphs statements to the effect that the suit instituted by Jai Dei on her own behalf and on behalf of the plaintiff was a fraudulent proceeding, and that the award and decree were fraudulent and should be set aside. It appears to us that the amendments made in the plaint in no way altered the character of the suit. The substantial relief sought by the plaintiff was the recovery of the property of her father Ishk Lal, and the facts set out in the plaint, if proved, coupled with the prayer for general relief, were quite sufficient to justify the Court in treating the award and decree as nullities, and giving the plaintiff the relief which she sought, notwithstanding that this relief was not asked for in express terms. The relief sought in respect of the award and decree was subservient or ancillary to the substantial relief prayed for, and it could not be said that a new case was sprung upon the defendants or that they were taken by surprise. It was, as we have said, held by a Bench of this Court in the suit in which the plaintiff intervened under section 32 of the Code of Civil Procedure that as the decree of the 5th of July, 1890, had not been set aside and was still a subsisting decree, she must have it set aside before she could have avoided the operation of it—*Bansi Lal* v. *Ramji Lal*, (1). In that case the provisions of section 44 of the Indian Evidence Act were not brought to the notice of the learned Judges who decided it, as we have learnt on inquiry from one of them. We do not find in the report of it any reference to this section. Section 44

(1) (1898) I. L. R., 20 All., 370.

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runs as follows:—"Any party to a suit or other proceeding may show that any judgment, or order, or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. In the present case we find the decree of the 5th of July, 1890, which was relevant under section 40, set up and proved by the defendants, the parties adverse to the plaintiff, as an answer to the plaintiff's claim, and according to the clear and explicit language of section 44, the plaintiff is entitled to show that the decree so relied upon was obtained by fraud or collusion. We are bound to consider the section according to the plain meaning of the language used, unless we can find in it or in any other part of the Act, anything that will either modify or qualify the language. This we have not been able to find, nor has our attention been called to any words in the section or in any other part of the Act, which modify or qualify the plain meaning of the language used. The authorities upon the question as to the powers of a Court to treat decrees which had been obtained by fraud as nullities are reviewed at some length in the judgment of a member of this Bench, which was delivered by him while sitting as Judge on the original side of the High Court at Calcutta in the case of *Nistarini Dassi* v. *Nundo Lall Bose* (1). In the later case of *Rajib Panda* v. *Lakhan Sendh Mahapatra* (2) the true meaning and effect of section 44 of the Evidence Act were also considered. In that case the plaintiff, in a suit to recover possession of a tank as well as damages, adduced in evidence a petition of compromise and a decree obtained upon it in a previous suit between the same parties relating to the same tank, and the defendant stated that the decree was obtained by fraud, and therefore was not binding upon him. The Court of first instance held that the plea of fraud was not proved, but on appeal by the defendant to the District Judge the decree of the Court of first instance was set aside without coming to any definite finding on the question of fraud. Against this decision the plaintiff appealed to the High Court, when Stevens, J., reversed the decree of the District Judge, and restored that of the Munsif, on the ground that the

(1) (1899) I. L. R., 26 Calc., 891. (2) (1899) I. L. R., 27 Calc., 11.

case was concluded by the decree in the previous suit, and so long as that decree was not set aside, either by proceedings duly taken in that suit, or by separate suit brought for the purpose, it was not open to the defendant to challenge it in any subsequent suit in which it was used as evidence against him. Against this decision the defendant preferred an appeal under Clause XV of the Letters Patent, and it was held by Maclean, C.J. and Banerji, J., that under section 44 of the Indian Evidence Act, the defendant was entitled to show that the decree was obtained by fraud, and the case was accordingly remanded. The section of the Indian Evidence Act relied upon, in our opinion, amply justify this decision, and we see no reason to dissent from it. Irrespective, therefore, of the amendments in the plaint by which the plaintiff sought in express terms that the award and decree might be set aside, we are of opinion that on her suit as originally framed she was entitled to ask the Court to treat the award and decree as nullities, in the event of her establishing by evidence that they were procured by fraud or collusion. On this ground, therefore, the appeal fails.

It has been further contended on the part of the appellants that the claim to have the award and decree set aside is barred by limitation, inasmuch as the amendments were made after the claim to set aside the deed was time-barred. As we hold that the plaintiff was entitled to obtain from the Court the relief which she sought upon her claim as it originally stood, it becomes unnecessary to determine this point. But we may say that, unless the amendments were improperly allowed or ought not to have been allowed by reasons of their converting the original suit into a suit of another and inconsistent character, there is no substance in the argument. For these reasons we hold that the statute of limitation furnishes no answer to the plaintiff's suit.

The appellants next contended that the plaintiff has no title to the property in suit, inasmuch as according to the custom established amongst Saraogis females are excluded from inheriting. The evidence given upon this subject is conflicting. A number of witnesses were examined in support of the custom, but their evidence is very vague and unsatisfactory. In several cases given as illustrations of the existence of the custom uncles succeeded to

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the exclusion of daughters; but whether or not this was due to the existence of the alleged custom depended on the fact whether or not the property was the exclusive property of the daughters' fathers, and not the joint property of their fathers and uncles. The witnesses no doubt in each case depose in a cut and dry statement that the fathers were separate from their brothers, but what their means of knowledge of this fact was is not shown. They are mere bald statements. In several instances it is clear that the daughters did not acquiesce in the existence of the alleged custom, for the question was referred to and decided by panchayats. No wajib-ul-arz was adduced in evidence in which any such custom was recorded. The evidence of one of the witnesses for the appellants, Kishen Sahai, goes to show that there was no uniform or established or recognised custom. He says that he believed that daughters inherit their fathers' estate, and that he enquired from members of the brotherhood whether this was so or not, and that some of them said that the daughters did inherit and some that they did not. In the absence of evidence to rebut the evidence of the defendants' witnesses, it would be difficult, upon the evidence which was adduced by the defendants, to hold that the alleged custom was proved; but when we consider the evidence of the witnesses who have been examined on behalf of the plaintiff, it becomes clear beyond any doubt that no such custom existed. A number of respectable witnesses were examined on behalf of the respondent, who deposed to a number of instances in which daughters succeeded to their father's property to the exclusion of uncles and cousins. One case was particularly noticeable; it was a case of one Bahal Singh, who died worth property of the value of more than one and a half lakhs of rupees consisting of three or four villages, some 50 shops and 25 houses. Bahal Singh's own brother was alive at the time of his death, and yet his (Bahal Singh's) daughter inherited the property. If there had been any such custom as is alleged by the respondents, it is most unlikely that Bahal Singh's brother would have allowed the daughter to take and hold this property. The weight of evidence is entirely on the side of the respondent. We agree, therefore, with the learned Subordinate Judge that the defendants have wholly failed to establish the alleged custom.

We now come to the last and most important issue raised in the case, namely, whether or not the arbitration proceedings and the award and decree thereon were tainted with fraud. It is clear that Musammat Jai Dei was not a fit and proper person to act as next friend of her sister in the suit which she instituted. In the first place, her interest and that of the plaintiff were seriously conflicting, inasmuch as in no event had Jai Dei, who was a married daughter, any interest in her father's property, and yet in the suit she claimed to have a right to a share. This fact was evidently not brought to the notice of the Court when permission was given to her to act as a next friend of the plaintiff. In the next place, Jai Dei was at the date of the institution of the suit herself a minor, she being only 15 years of age, and therefore incapable of protecting the plaintiff's interests. This fact was also suppressed from the Court. Again, no relative of the plaintiff was appointed an arbitrator to look after her interest. All the arbitrators appear to have been relatives of, or connected with, the other parties to the proceedings. Then there is the further fact that out of the estate of her father, which was of the value of at least Rs. 50,000, the trifling sum of Rs. 4,000 only was awarded by the arbitrators to the plaintiff, while Jai Dei, who was not entitled to any share in it, got Rs. 7,500, and the balance was given to Daulat Ram and Ramji Lal. These matters alone would be sufficient, in our opinion, to establish the plaintiff's allegations of fraud and collusion. It is clear from them that the plaintiffs' interests were sacrificed by the parties who promoted and carried out the arbitration proceedings, and obtained a decree upon the award. *Res ipsa loquitur*. That this was so, is placed beyond all doubt by the evidence of some of the witnesses who were examined. Kishen Sahai, a witness for the defendants, who is the elder brother of the husband of Jai Dei and acted as attorney for Musammat Jai Dei in the arbitration proceedings, in the course of his evidence stated that he had spent about two and a half or three thousand rupees in proceedings taken on behalf of Jai Dei. He admitted that he believed that daughters inherited their fathers' estate, but that the defendants, Daulat Ram and Ramji Lal, told him that he "should refer the case to arbitration in respect of the questions between

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the parties, otherwise he would have to fight the case up to the High Court and would be ruined." It is apparent from this that Kishen Sahai had a personal interest in the success of Jai Dei's claim. Another witness, Din Dayal, who is a son of the defendant Ramji Lal, deposed that the last witness, Kishen Sahai, told him that the matter should be referred to arbitration; that if the defendants, *i.e.* Ramji Lal and Daulat Ram, would not refer the matter to arbitration, they as well as his principal, that is, Jai Dei, would be deprived of the property, inasmuch as the entire property would go to the plaintiff, Musammat Dhapo; that afterwards they consulted pleaders on the subject, and learnt from them that these parties would get no share, and that Musammat Dhapo's right would be maintained. He further said that the arbitrators did not decide the question as to whether or not the plaintiff was entitled to the property, inasmuch as they had asked them to award something to such persons. This evidence, if true, and we see no reason for disbelieving it, shows beyond any doubt the fraudulent nature of the arbitration proceedings. Another witness, Kabul Singh, who appears to have been an acquaintance and friend of Ramji Lal and Daulat Ram, deposed to a conversation which he had with Kishen Sahai in the course of which Kishen Sahai stated that he had brought a suit in respect of Jai Dei's right, but that Ramji Lal and Daulat Ram had set up a defence that the plaintiff was entitled to inherit all the property, and further, that it would be better to refer the matter to arbitration, so that the property might be divided amongst all; but Daulat Ram and Ramji Lal said that they had also consulted their legal adviser, and that he also advised them that it would be better if the matter was referred to arbitration. Another witness, Medh Singh, a kinsman of Ramji Lal and Daulat Ram, deposed to the same effect as the last witnesses. He stated, in substance, that Kishen Sahai told him that the plaintiff had the right to all the property, and that he told Ramji Lal and Daulat Ram so, and asked them to refer the matter to arbitration; that subsequently, in the presence of Kabul Singh, Nihal, Daulat Ram and Ramji Lal, Kishen Sahai was informed that the pleaders had expressed their opinion "that the plaintiff would get her right, that none of them would get even

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a share in it, and that therefore there should be appointed arbitrators who would divide the estate amongst all the persons." We have no reason to doubt the credibility of this evidence. It is consistent with the other facts which have been established by the plaintiff in connection with the arbitration proceedings, and we believe it to be true. It places beyond doubt the truth of the plaintiff's allegation that the award and the decree thereon were obtained by fraud and collusion. It appears to us that not merely was a gross fraud committed upon the plaintiff, but that a fraud was also practised upon the Court in suppressing the true state of facts when permission was given to Jai Dei, herself then a minor, to act as next friend of the plaintiff. We, for these reasons, entirely concur in the view expressed by the learned Subordinate Judge and have no hesitation in dismissing this appeal. Accordingly we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1901
February 5.

SAIYID ALI KHAN AND OTHERS (DEFENDANTS) *v.* DEBI PRASAD (PLAINTIFF).*

Act No. IX of 1872 *(Indian Contract Act), section* 176—*Pawnor and pawnee—Suit to recover balance of debt after sale of articles pawned —Limitation—Act No. XV of* 1877 *(Indian Limitation Act), schedule II, article* 57.

Held, that the limitation applicable to a suit brought by a pawnee to recover the balance of his debt after accounting for the proceeds of the sale of the articles pledged is that prescribed by Article 57 of the second schedule to the Indian Limitation Act, 1877, namely, three years, and the *terminus a quo* the date of the loan. *Madan Mohan Lal* v. *Kanhai Lal* (1) and *Ram Chandra* v. *Antaji* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* and Maulvi *Ghulam Mujtaba*, for the appellants.

The Hon'ble Mr. *Conlan* and Pandit *Sundar Lal*, for the respondent.

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* First Appeal No. 90 of 1899 from a decree of Munshi Sheo Sahai, Officiating Subordinate Judge of Cawnpore, dated the 23rd March 1899.

(1) (1895) I. L. R., 17 All., 284. (2) Bom., P. J. 1886, p. 161

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BANERJI and AIKMAN, JJ.—The first question we have to determine in this appeal is, whether the suit of the plaintiff-respondent was barred by limitation. The plaintiff stated that he had money dealings with the defendants who borrowed different sums of money from him from time to time since 1879. To secure these loans they pledged jewellery and other movable property. This property the plaintiff alleges has been sold by him under the power vested in him by section 176 of the Contract Act, and a balance is due, which he seeks to recover personally from the defendants. As has been stated above, the dealings began in 1879; the last advance actually made was on the 5th of November, 1886. Interest is said to have been paid from time to time, but no interest was paid after 1888. The present suit was brought on the 20th of December, 1897. The plea of limitation was set up by the defendants, but it was overruled by the Court below, which decreed the claim. It is contended on behalf of the appellants that the article of schedule ii of the Limitation Act applicable to the suit is article 57. The Court below has applied article 120, being of opinion that no other specific article of the schedule is applicable. It has computed the period of limitation from the 23rd of February, 1897, when the plaintiff sent a notice to the defendants demanding payment of the balance alleged to be due by them. The learned counsel for the respondent admits that that date cannot be regarded as the date on which the plaintiff's right to sue accrued. But he urges that the right came into existence on the date on which, after the sale of the movable property pledged to him, the plaintiff discovered that there was a balance still due. It has been held by this Court that a suit to recover personally from the debtor the amount of a loan for which movable property is pledged is governed by article 57 of schedule ii of the Limitation Act.—*Madan Mohan Lal* v. *Kanhai Lal* (1). It was also held in that case that the six years' limitation prescribed by article 120 applies to a claim to enforce the pledge. This is admittedly not a suit to enforce a pledge. In our opinion the claim is one to recover the unpaid balance of a loan, that is to say, it is a suit for money payable to the plaintiff for money lent by him, a suit

(1) (1895) I. L. R., 17 All., 284.

which is specifically provided for by article 57. The fact that movable property was pledged as collateral security does not, in our judgment, render the suit a suit of any other description than that to which the article referred to above applies. This view is supported by the ruling of the Bombay High Court in *Ram Chandra* v. *Antaji* (1) cited in Rivaz on the Limitation Act, p. 122. There it was held that a suit by a pawnee to recover the balance due on his debt after accounting for the proceeds of the sale of the articles pledged must be brought within three years from the date of the loan. That case is on all fours with the present, and we agree with the view adopted in it. The learned Subordinate Judge thinks that section 176 of the Contract Act conferred a new right on the plaintiff, and this was the contention of the learned advocate for the respondent. In our opinion this view is erroneous. What the plaintiff seeks to recover is the balance of the loan given by him to the defendants. That loan was secured by the pledge of movable property. Section 176 of the Contract Act gives the pawnee the right to bring a suit on the debt, retaining the article pledged as collateral security. It also empowers him to sell the thing pledged after giving reasonable notice, and to recover the balance of the debt, if any, remaining after such sale. The original contract of loan is not put an end to or superseded, and no right which did not exist before has accrued by the sale. In the present case, as the last item of loan was, as already stated, given in 1886, and as the suit was brought long after the expiry of three years from that date, or from the latest payment of interest, it is clearly beyond time. This is sufficient for the disposal of the appeal. We set aside the decree of the Court below, and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

(1) Bom. P. J., 1886, p. 161.

1902
February 7.

REVISIONAL CRIMINAL.

Before Sir John Stanley, Knight, Chief Justice.

EMPEROR *v.* GULZARI LAL.*

Act No. XLV of 1860 *(Indian Penal Code), section* 406—*Criminal breach of trust—Charge—Criminal Procedure Code, sections* 222, 234.

Where an accused person is charged with having misappropriated or committed criminal breach of trust in respect of an aggregate sum of money, the whole sum being alleged to have been wrongfully dealt with by the accused within a period not exceeding one year, the mere fact that the items composing the such aggregate sum are specified and may be more than three in number will not render the charge obnoxious to the prohibition implied by section 234 of the Code of Criminal Procedure. *Subrahmania Ayyar* v. *King-Emperor* (1) distinguished.

THE applicant in this case was charged with having committed the offence of criminal misappropriation or cheating in respect of an aggregate sum of Rs. 37-3-6 representing various amounts collected by him under false pretexts from certain tenants, and was sentenced therefor to two years' rigorous imprisonment. He appealed from this conviction and sentence to the Sessions Judge, who maintained the conviction, whilst reducing the sentence to one of eighteen months. Against this order an application for revision was presented to the High Court, and there it was argued, as it had been argued before the Sessions Judge, that the charge was illegal, having regard to the ruling of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (1). The charge in the present case was a charge of misappropriating the sum total of different items, all alleged to have been collected by the applicant within a period of less than one year, but it further specified the various items collected, which were more than three in number.

Babu *Satya Chandra Mukerji*, for the appellants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

STANLEY, C.J.—There are no grounds for this application. Gulzari Lal was tried and convicted of the embezzlement of sums of money amounting in the aggregate to Rs. 37-3-6, moneys paid to him as patwari of a certain village by the tenants under the

* Criminal Revision No. 899 of 1901.

(1) (1901) I. L. R., 25 Mad., 61: S. C., 5 C. W. N., 866.

Court of Wards, and which he represented that he had authority to collect. In the charge the aggregate amount of the items is stated, and, in addition to that, the particulars giving the dates and the amounts of three payments are also stated. It is to be observed that the alleged criminal breach of trust was committed within the period of one year, and therefore the provisions of sub-section 2 of section 222 of the Code of Criminal Procedure apply. This sub-section is in the following terms:—"When the accused is charged with criminal breach of trust, or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234: provided that the time included between the first and last of such dates shall not exceed one year." It seems to me clear that particulars as required by this section had been given—in fact more particulars than it was necessary to give to the accused were given in the charge. It has been argued by the learned vakil for the applicant that because it was in the power, or may have been in the power, of the prosecution to supply fuller particulars, they ought to have done so, and are not entitled to the benefit of the latter part of the section. I find, however, nothing in the Code of Criminal Procedure to warrant such an argument. This case is not governed by the decision of their Lordships of the Privy Council in the case of *Subrahmania Ayyar* v. *King-Emperor* (1), inasmuch as in that case the offences with which the accused was charged extended over a period longer than a year. For these reasons the application is refused. The applicant must surrender himself and undergo the rest of his sentence.

(1) (1901) I. L. R., 25 Mad., 61, S. C., 5 C. W. N., 866.

1902
February 10.

Before Sir John Stanley, Knight, Chief Justice.

EMPEROR *v.* KALI CHARAN AND OTHERS.*

Criminal Procedure Code, section 188—*Offence committed outside British India by a Native Indian subject of His Majesty—Certificate of Political Agent not obtained before making inquiry.*

Where an inquiry into an offence to which section 188 of the Code of Criminal Procedure was applicable was commenced without the certificate provided for by that section having been obtained, it was *held* that the proceedings were void, and that the subsequent commitment to the Court of Session must be quashed, notwithstanding that the necessary certificate was in fact granted some days before the commitment was made, though at the time of the commitment being made it had not come into the hands of the Committing Magistrate.

IN this case certain persons, Native Indian subjects of His Majesty, and residents of a village in the Basti district, were charged before a first class Magistrate of that district with the offence of dacoity, alleged to have been committed by them in Nepal. At the time when the inquiry before the Magistrate commenced no certificate, such as is required by section 188 of the Code of Criminal Procedure, had been obtained. The Magistrate committed the accused to the Court of Session on the 21st of November, 1901, the necessary certificate up to that time apparently not having reached him. At that time, however, the certificate of the Political Agent in Nepal was in existence, having been signed by the Political Agent on the 19th of November. On the commitment coming before the Sessions Judge, he referred the case to the High Court with a view to the commitment being quashed as illegal owing to the absence of the requisite certificate.

The Assistant Government Advocate (Mr. *W. K. Porter*) in support of the order of the Magistrate.

STANLEY, C.J.—This is a reference by the learned Sessions Judge of Gorakhpur, submitting the record to the High Court with a recommendation that the commitment of the accused Kali Charan Arakh, Behari Arakh, and Girdhari Arakh, who are British subjects, be quashed under section 215 of Act No. V of 1898, on the ground that the same was illegal. The offence with which the accused are charged is alleged to have been committed in Nepal. The Magistrate inquired into the charge without

* Criminal Reference No. 43 of 1902,

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having the certificate of the Political Agent of Nepal as required by section 188 of the Code of Criminal Procedure. This section provides that no charge as to, among others, an offence committed beyond the limits of British India, or by a British subject in the territories of any Native Prince or Chief in India, shall be enquired into in British India unless the Political Agent, if there be one, for the territory in which the offence is said to have been committed, certifies that, in his opinion, the charge ought to be enquired into in British India. It is admitted that the certificate of the Political Agent in Nepal was not obtained before the commencement of the inquiry by the committing Magistrate, although it was subsequently obtained. It appears to me that under the language of this section the obtaining of such certificate is a preliminary requisite to the holding of an inquiry into such a charge. The alleged offence having been committed without the limits of British India, the section forbids any inquiry until the certificate has been obtained. I think, therefore, that the commitment was illegal, and I declare it to be so and quash the commitment. It will be open, however, to the Magistrate to institute criminal proceedings *de novo* against the accused in accordance with law.

[See in this connection the cases of *Queen-Empress* v. *Ram Sundar* (1) and *Queen-Empress* v. *Kathaperumal* (2), in which, however, there was no certificate at all in existence at the time of the commitment being made.—ED.]

APPELLATE CIVIL.

1902
February 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

HAMID ALI AND ANOTHER (PLAINTIFFS) *v.* MUJAWAR HUSAIN KHAN AND ANOTHER (DEFENDANTS).*

Muhammadan Law—Shias—Waqf—Essentials of a valid waqf according to the Shia law—Illusory dedication.

One Muhammad Faiyaz Ali Khan, a Muhammadan of the Shia sect, on the 7th of May, 1878, caused to be drawn up an instrument, by which he purported to make a waqf of the whole of his property. This instrument, beyond the

* First Appeal No. 2 of 1899 from a decree of J. Denman Esq., District Judge of Allahabad, dated the 19th September, 1898

(1) (1886) I. L. R., 19 All., 109. (2) (1889) I. L. R., 13 Mad., 423.

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bare statement that the property was constituted waqf, contained no specification of the purposes to which it was to be devoted. The settlor, however, after naming himself as the mutawalli of the waqf property during his life, went on to declare that the precise purposes of the dedication, and the mode in which the waqf property was to be managed, would be set forth in a will which the settlor was about to execute. But he added that the future will should always be acted on after his death, and, so far as he himself was concerned, laid down no rules for the management of the waqf property. On the 11th of May, 1878, the instrument above referred to and the will were executed by Faiyaz Ali Khan, and they were both registered on the 13th of the same month. The will provided for the succession to the office of mutawalli after the death of the testator, and laid down certain "rules of practice" to be observed with reference to the management of the endowed property. These rules of practice for the most part merely enjoined upon the mutawalli the keeping up of the religious observances which had been usually performed by the testator in his life-time, and which were no more than such ceremonies as would ordinarily be performed by a pious and well-to-do Muhammadan of the sect to which the testator belonged. The tenth paragraph of the rules of practice did, however, provide that should the settlor have left any debts "the succeeding mutawalli should pay them *first of all* by curtailing all the expenses." The former of these two documents, while reciting that the waqf was created "in order to obtain benefit in the next world," also provided that the property dealt with thereby should "under no circumstances be made the subject of inheritance," and otherwise clearly indicated that the object of the waqf was very largely the preservation of the property in the hands of the settlor's descendants. After the execution of these documents the settlor never had himself recorded in the Revenue records as mutawalli instead of proprietor, and his son, the succeeding mutawalli, was recorded as proprietor and not as mutawalli.

Held by Stanley, C.J., that the so-called waqf-namah was invalid, for the reason, chiefly, that there was therein no specific dedication to religious or charitable uses, such as was necessary to constitute a valid waqf. The subsequent will could not be prayed in aid to complete the transaction, inasmuch as under the Muhammadan law applicable to the Shia sect a waqf could not be created by will. It appeared moreover that the settlor's intention was to suspend the operation of the waqf-namah until after his death, which also was not permissible according to the Shia law. If the two documents could be read together, even then the waqf would be invalid, as it appeared that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family. *Agha Ali Khan* v. *Altaf Hasan Khan* (1), *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla* (2); *Mahomed Hamidulla Khan* v. *Lotful Huq* (3); *Pathukutti* v. *Avathakutti* (4) and *Syeda Bibi* v. *Mughal Jan* (5) referred to.

Per BURKITT, J.—The waqf-namah and the will could be read together as constituting but one transaction, which was not therefore open to the objection

(1) (1892) I. L. R., 14 All., 429.
(2) (1873) 10 Bom. H. C. Rep., 7.
(3) (1881) I. L. R., 6 Calc., 744.
(4) (1888) I. L. R., 13 Mad., 66.
(5) *Supra*, p. 231; S. C., Weekly Notes, 1902, p. 32.

of being a testamentary waqf, inasmuch as the dedication was made by the waqf-namah, and the will did not purport to make any testamentary disposition in favour of the succeeding mutawalli, but merely recited the dedication made in the waqf-namah, and then went on to lay down certain rules as to the management of the property. But even so the waqf was invalid as not being a real and substantial dedication to religious or charitable purposes, but under the guise of such dedication an attempt to preserve the property intact for the benefit of the settlor's family. Apart from this, the provisions of the tenth paragraph of the rules of practice referred to above as to the payment of the settlor's debts by the succeeding mutawalli were of themselves sufficient to invalidate the waqf. It was further open to considerable doubt whether, under the circumstances of the case, the settlor had ever taken such possession *as mutawalli* of the waqf property as is requisite under the Shia law.

THE facts of this case are fully stated in the judgments, the material portions of the documents in question being set forth at length in the judgment of Stanley, C.J.

Maulvi *Muhammad Ishaq Khan* and Munshi *Gulzari Lal*, for the appellants.

Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the respondents.

BURKITT, J.—This is an appeal against a decree of the District Judge of Allahabad, dated September 19th, 1898, by which he dismissed the plaintiffs' suit.

The reliefs asked for by the plaintiffs in the prayer to their plaint were—(1) for the removal of the first-named defendant, Mujawar Ali, from the office of mutawalli of certain property detailed in the plaint, which the plaintiffs alleged to be waqf or endowed property; (2) for a declaration that that property was not saleable in execution of a decree obtained by the second defendant, Musammat Dhan Devi, that the sale of that property and its purchase at the execution sale by Musammat Dhan Devi was null and that her possession was unlawful.

The first defendant did not appear to defend the suit. The second defendant denied that the property in suit was waqf, and also pleaded that on the death of Faiyaz Husain Khan, father of the first defendant, the alleged waqif, the property was recorded by the Revenue authorities in the name of his son, the first defendant, as full owner, who, as such, mortgaged the properties in suit to her deceased husband, Mul Narain, who took the mortgage in good faith, and without any knowledge of the alleged waqf.

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The learned District Judge found that the waqf was valid, but also found that it had never been acted on. He, therefore, dismissed the suit. The plaintiffs appeal. They by their memorandum of appeal contend that there are no grounds for the finding that effect was not given to the waqf, and that it is a valid and subsisting endowment.

The waqif, Muhammad Faiyaz Ali Khan, was a Muhammadan of the Shia sect. In considering this appeal we have, therefore, to apply to it the rules of the Shia law regarding waqf. Those rules will be found at great length in the elaborate judgment of Mr. Justice Mahmood, when delivering the judgment of the Full Bench of this Court in the case of *Agha Ali Khan* v. *Altaf Hasan Khan* (1).

The waqf-namah under consideration in this appeal is made up of two parts, one purporting to bear date of May 7th, 1878, and the other (which is called a will) being dated May 11th, 1878. But as a matter of fact they constitute but one instrument; and though the first part may perhaps have been written out on May 7th, both parts were executed and attested by the same witnesses on one and the same day, namely, May 11th, and were both presented for registration on May 13th by the executant, Muhammad Faiyaz Ali Khan.

It was contended that under the rule laid down in the case cited above the appropriation of the property in the present case was bad as being a testamentary waqf, in which possession had not been given by the waqif to the mutawalli. Such is not the case in my opinion. The first part of the waqf-namah is that which contains the dedicatory words. It is in this part that the executant purports to appropriate certain property to the Hazrat Imam Husain, and purports to retain possession of it thenceforth as mutawalli, and not as beneficial owner. The second part, which is styled a will, does not purport to make any testamentary disposition of any property in favour of the succeeding mutawalli. It merely recites the appropriation made in the earlier part, dated May 7th, and then goes on to make certain rules respecting the management of the property. The appropriation, if valid, is complete under the terms of the first part of the

(1)(1892) I. L. R., 14 All., 429.

waqf-namah, and it is under that part, and not under the will, that the settlor's son, the first defendant, would have taken as mutawalli. Therefore, in my opinion, the appropriation is not nugatory as being a testamentary waqf.

Turning now to the waqf-namah, the first and most important matter to be ascertained is the object for which the waqf was constituted.

As to that question the settlor leaves no room for doubt. The waqf-namah begins with an assertion that "it is incumbent on every individual to protect his life and property, and life is transient," especially in his case, as he had been "unwell for a long time," and that, *therefore*, he had dedicated the property now in dispute to the Hazrat Imam Husain "*in order to obtain benefit in the next world*," and has retained the ownership in his own hands as mutawalli and manager for his life without any power to transfer. That proprety, he adds, "*shall never, and under no circumstances, be made the subject of inheritance.*" In the second part of the waqf-namah he sets forth more fully his reasons for, and the object of, the dedication. After again alluding to his illness and that "transient life is uncertain," the settlor proceeds as follows:—"As I myself have seen the condition of my own four brothers and the ruin and miserable state of their property and families and children after their death, it is necessary and incumbent on me to make *some arrangement of my property*. I have, *therefore*, dedicated the whole of my property detailed below to God, the Apostle, and the holy Imams (on whom be peace), to obtain an everlasting benefit in the next world, and have appropriated the same by executing the waqf-namah, dated 7th May." There is a declaration that the endowed property shall never be open to inheritance. The meaning of the above clearly is, that the settlor having seen the miserable condition to which his four brothers and their families and children and property had been reduced (presumably because the properties of his four brothers, being subject to the law of inheritance, had been wasted, and their families reduced to indigence) felt it incumbent on himself to make "*some arrangement*" *of his own property* to avoid those evils. With *this* object the plan he adopts is to make a dedication of it to the Hazrat Imam Husain

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in order to obtain benefit in the next world. That is to say, he attempts to establish a perpetuity in favour of his own descendants as beneficiaries, an estate which shall not be subject to the law of inheritance, which shall not be susceptible of transfer, and which therefore cannot be wasted by his descendants as the properties of his brothers had been wasted. And this he purports to do under the guise of a dedication to God, the Apostle, and the holy Imams. Beyond this there is no dedication of any sort. There is no dedication (such as is usual in waqfs) to any charitable or religious uses, nor any dedication, whether immediate or ultimate, for the benefit of the poor. Under the first part of the waqf-namah the settlor assumes possession as mutawalli of the endowed property, untrammelled by any dedication to any purpose, or by any direction as to how he is to use the revenues. He says, no doubt, that it is his intention to specify in detail in writing the powers he possesses in respect of the waqf property in a separate will, but adds that this "will" should always be acted on *after his death*, but that during his life he will manage the property and look after the affairs of the imambara *as he may think expedient*. So there was no obligation on him during the remainder of his life to do any of the acts he in the will directs his successors to perform, but after him "everything shall be always done in accordance with the terms specified in the will." As long as he lived the waqf was practically in abeyance, or rather did not come into existence.

Turning now to the terms of the "will," which sets forth the powers the mutawalli is to possess in respect of the management of the waqf property, the settlor in the first paragraph reiterates his determination that after him the property shall not be subject to the law of inheritance. In the second paragraph he recites the appointment made in the first part of his son (the first defendant) to be mutawalli, with his wife, Musammat Fizza Begam, as the son's guardian during his minority, for the performance of the affairs mentioned in the will, she being bound to act "in accordance with what is written hereafter and declared to be *the rule of practice*." In the third paragraph the guardian is directed to act under the advice of three persons, namely, Mir Imdad Ali, Khan Bahadur, whose son is one of the plaintiffs appellants in

this case; Wahid Husain Khan and Inayat Ali Khan, whose wife (sister of the settlor) is another of the plaintiffs appellants in this case. Very large powers are given to these persons and to the majority of them. They are even authorized to remove the mutawalli. The next three paragraphs have reference to the education and training of the settlor's son and to the succession to the office of mutawalli. The latter is always to be one of the settlor's descendants, and in case of a failure of male descendants, then a female or a relative, or an able man of another sect, may be appointed as a *paid* mutawalli, but such paid mutawalli is to be paid as little as possible, and is in no case to get more than Rs. 10 per month.

The seventh, eighth, and ninth paragraphs are not very important.

The tenth paragraph, however, is most important. It provides that if the settlor have left any debts the succeeding mutawalli should pay them *first of all* by curtailing all the expenses. The meaning of this is, that the first duty incumbent on the mutawalli is to pay any debts his father, the settlor, may have left unpaid; that this is to be done first of all, and that it is to be accomplished by reducing the expenditure, for which provision is subsequently made. This condition alone is sufficient to vitiate the waqf, even if otherwise unobjectionable. That such is the law applicable to Shias is most unmistakably laid down in Shama Churun Sircar's Tagore Law Lectures of 1874, p. 473, and in Syed Ameer Ali's Muhammadan Law, Vol. 1, p. 411. This matter alone is, in my opinion, quite sufficient to justify us in dismissing this appeal.

I think it right nevertheless to discuss the remaining paragraphs of these "rules of practice" (dastur-ul-amal). The eleventh paragraph provides that certain trees are to be left standing, and offerings of flowers made at certain places, and a chapter of the Quran to be recited, the benefit of which is to be transferred to the benefit of the souls of deceased Musalmans. The concluding portion of this paragraph seems to imply that it is the duty of the mutawalli to provide for all the male descendants of the settlor who become "paiks." The twelfth paragraph directs the mutawalli to provide the petty sum of Rs. 30—one rupee a

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day—during the fasting month (Ramzan)—to be spent daily in the ceremonial breaking of the fast (after sunset) during the month, and in the morning ceremony on the 21st of that month. Then a sum of Rs. 80 is provided for illuminations and assemblies (majlis), with directions as to the special dishes to be served on the 3rd, 7th, and 8th, and a majlis is to be held on every Friday between the 3rd and 40th days. If there be any unexpended balance this paragraph provides that there should be a proper and economical distribution of it, and again "let there be some distribution on some day." A sum of Rs. 100 is to be spent on the procession in honour of the 40th day, but out of this sum Rs. 20 is to be given *as usual* to the females (of the settlor's family) for their expenses on the days preceding the 40th day. Then follows a provision that Rs. 10 are to be spent in fireworks to be let off *as usual*, and that a fund of Rs. 100 annually should accumulate for five years to be spent in additions to the imambara, and in helping some descendants of the settlor to go to Mecca if there be any surplus. The last clause of this paragraph is not of much importance. Now as to all the above matters directed in this will there is a finding by the lower Court which has not been contested in this appeal, that everything therein directed had been usually done in the life-time of the settlor. They all (with the exception perhaps of the accumulation of Rs. 100 for five years) are such acts as any pious Muhammadan gentleman of the Shia sect in good circumstances would do of his own accord.

I am in full accord with the opinion of the lower Court, that no effect ever was given to this waqf-namah. The settlor died in July 1878. What happened after his death we do not know, except that the property which his father had purported to dedicate was at once recorded in the name of the son as full owner in the official records. The son was not of age then. But when he did come of age, he lost no time in raising money on the property, the first loan being in 1893 and the last in 1895. It was not till 1898 that the present plaintiffs (who as near relatives must have known what Mujawar Ali was doing) instituted the present suit after the property had been sold to pay the debts which Mujawar had imposed on it. In less than three years he had borrowed nearly Rs. 4,000, treating the alleged waqf

property as his own and borrowing money on its security. It is only at the last moment that the plaintiffs came in, and alleging that Mujawar Ali had no power to alienate the property, they ask the Court to deprive the mortgagee of the fruits of her decree against it. After a careful consideration of the whole case, I am of opinion that the waqf-namah on which the appellants rely is not a valid instrument. It contains no dedication of the property to the worship of God. It contains no immediate or ultimate dedication of that property to any unfailing religious or charitable object, or for the relief of the poor. It seems to me to have been nothing more than a mere paper transaction. The one object of the settlor appears to me to have been to settle the property on his descendants in perpetuity, so as to remove it from the operation of the law of inheritance, and prevent the recurrence of the evils he had seen in his brothers' families. *That*, and not the worship of God or the benefit of his fellow-Musalmans, was his sole object. He settles the property first on himself, and then on his son and descendants, and instructs the latter to carry on certain ceremonial observances which he had been accustomed to perform. This is not a case of a dedication to the worship of God or to religious and charitable uses, with a provision engrafted thereon for the benefit of the settlor's family, but is a case of a perpetual endowment on the family with instructions to do certain ceremonial acts, some of which may be of a religious nature. Such a dedication is not, in my opinion, valid. It may also be strongly doubted whether there was in this case that strict seisin by the mutawalli which the Shia law requires. The settlor did no doubt draw up the paper waqf-namah, in which he says that thenceforth he holds the property as mutawalli. But he did nothing more except to register the paper. He in no way changed the outward appearance of the title by which he remained in possession. If he had been sincere in his desire to divest himself of his proprietary title, he would have at once applied to the Revenue authorities to have his name no longer recorded in the public registers as owner of the dedicated property, and instead to have a new entry made recording him as mutawalli. This he did not do, nor after his death did his son's guardian have a correct entry made. It is

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admitted that Mujawar Husain Khan was, after his father's death, entered as full owner, and not as mutawalli. The respondent's husband, when he consulted the village papers previous to accepting the mortgage, would not have found any indication that Mujawar Husain Khan had not a full and absolute title to the property, nor that fifteen years previously that property had become waqf. On the above facts I am unable to say that the settlor, notwithstanding his paper declaration to that effect, did really obtain that seisin as mutawalli which the Shia law requires.

For all the above reasons I have come to the conclusion that the decision of the Court below dismissing the suit is right. I would, therefore, dismiss this appeal with costs.

STANLEY, C.J.—The suit out of which this appeal has arisen has been brought by the plaintiffs, who are members of the family of the late Faiyaz Husain Khan, to have it declared that certain properties situate in the district, and also in the city of Allahabad, and in the district of Fatehpur, are waqf properties, and that a sale of a part of the property which was held on the 20th of December, 1897, at the instance of the defendant, Musammat Dhan Devi, the widow of Munshi Mul Narain, a mortgagee, in execution of a mortgage decree obtained by Mul Narain, was null and void. By the plaint the plaintiffs also seek to have the defendant, Mujawar Husain, who is the son of Faiyaz Husain Khan, removed from the office of mutawalli of the property. and to have some other person appointed in his place. The facts are shortly as follows:—

On the 7th of May, 1878, Faiyaz Ali Khan executed a deed purporting to dedicate to Hazrat Imam Husain the properties belonging to him in order to obtain benefit in the next world. The deed runs as follows:—"I, Muhammad Faiyaz Ali Khan, son of Ashraf Ali Khan, resident of muhalla Dariabad, one of the muhallas of the city of Allahabad, do declare as follows:—It is incumbent on every individual to protect his life and property, and life is transient, as clear from the tenor of the holy verse, *viz.* "Every soul shall taste of death," and life is altogether uncertain, especially in my case, who have also been unwell for a long time, therefore I, while in a sound state of body and mind,

and in possession of all my senses, have dedicated (made a waqf of) of my own free will and accord, the undermentioned property, consisting of the zamindari, houses, and groves owned and possessed by me, to Hazrat Imam Husain (peace be on him), in order to obtain benefit in the next world, and have retained the ownership of the same in my hands as a mutawalli (superintendent) and manager for my life without any power of transfer whatever. I shall reduce into writing in detail and specify the powers which I possess in respect of the management of the waqf property in a separate will, which should always be acted upon after my death. During my life I, the executant, myself will manage the property as a mutawalli (superintendent), and look after the affairs of the imambara and repairs, etc, as will be deemed expedient; and after me everything shall always be done in accordance with the terms specified in the will, which I will execute hereafter. After my death my own son, Mujawar Husain Khan *alias* Salwat Husain Khan, besides whom I have no other male issue, shall be the mutawalli (superintendent) of the appropriated (waqf) property under the guardianship of my wife, Musammat Fizza Begam, according to the terms of the will to be hereafter executed by me. During the minority of the said son, the said Musammat shall perform all the affairs as guardian of the said mutawalli (superintendent). The undermentioned property, which I have willingly appropriated, shall never, and under no circumstances, be made the subject of inheritance. I have consequently written these presents by way of waqf-namah (deed of appropriation) amounting to a deed of gift in respect of the property specified below that it may serve as evidence." Then follow the details of the properties so dedicated.

This document which I shall describe as the waqf-namah was written on the 7th of May, but was not attested until the 11th, and on the 13th of May it was registered. On the same day on which the waqf-namah was attested Faiyaz Ali Khan also executed a will, which commences with the following recital:—

"As I have been unwell for a long time and the transient life is uncertain, and as I myself have seen the condition of my four own brothers, and the ruin and miserable state of their property and families and children after their death, it is necessary and

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incumbent on me to make some arrangement of my property. I have, therefore, dedicated the whole of my property detailed below to God, the Apostle, and the holy Imams (on whom be peace) to obtain an everlasting benefit in the next world, and have appropriated the same by executing the waqf-namah (deed of appropriation), dated the 7th May. I execute this will to the following effect that it may be enforceable for ever, and that everything be done in accordance with its terms. Inheritance shall never open in respect of the under-mentioned property which has been appropriated for good (pious) purposes." In clause 1 of this document the testator declares that no one has a right to, or share in, the property, nor shall inheritance open in respect of it after him, and that even the mutawalli shall have no power to transfer or mortgage any part of it. In clause 2 he appoints his son, the defendant Mujawar Ali Khan, mutawalli, and in the succeeding clauses 3, 5, and 6, provision is made for the management of the property, and also for the removal and appointment of mutawallis. In clause 12 a sum of Rs. 350 is fixed to defray all the expenses in connection with the ceremony of mourning, the breaking of fast in the month of Ramzan, and the Shab-i-Barat, etc. It is in this last-mentioned clause that the objects of the dedication of the property are specified. From the view which I have formed of the case and upon which I am prepared to decide it, it is unnecessary for me to refer more particularly to the provisions of the will. The net income of the property is stated in the details attached to the will to be Rs. 862-3-4. In respect of the application of Rs. 350 only of this amount are directions given in the will. Faiyaz Husain Khan died on the 5th July, 1878, and upon his death his son, Mujawar Husain Khan, entered into possession of the properties. He in the years 1892, 1893, 1894, and 1895, borrowed moneys, amounting in the aggregate to Rs. 3,900, from Mul Narain, on the security of mortgages of the property which his father purported to dedicate as waqf. Mul Narain brought a suit to recover the amount due to him, and obtained a decree on the 21st of April, 1896, and he having died, his widow, the respondent Dhan Devi, took out execution of the decree, and caused part of the property to be sold by auction, and herself purchased it on the 20th of December, 1897, and obtained

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possession. It is to have this sale set aside that the present suit was instituted. Faiyaz Husain Khan belonged to the Shia community of Muhammadans, and it is by the Shia law, therefore, that any question arising in the case must be determined.

The learned District Judge held that the waqf-namah and wasiyat-namah (will) were really parts of one and the same transaction, and must be read together, and that, so reading them, although the main purport of the waqf was to create a trust and prevent the descendants of the waqf from ruining and alienating the property, still enough of the income of the property had been set apart for religious purposes, and that the religious element in the waqf was not nominal and fictitious, but was large enough to make a valid waqf. He held, however, that the waqf had not been given effect to, and that the defendant, Mujawar Husain, held possession of the property as owner and not as mutawalli, and that the suit was not therefore maintainable, and he accordingly dismissed it. For the appellants, it was at first contended by their learned counsel that the waqf-namah and the will must be read together, and that their combined effect was to create a valid dedication of the property to religious and pious purposes. When, however, he was met by the argument that under the Shia law a waqf can only be created by act *inter vivos* and not by will, he fell back on the contention that the waqf-namah of itself, independently of the will, was an effectual dedication of the property as waqf. Now that the contemporaneous document was intended to operate as a will, and as a will only appears to me to be manifest from its language. The executant describes it as such in clear terms. In the earlier part of it he states:—"I execute this *will* to the following effect:" and again in another place he uses in respect of it the words "this will," and at the end of the document states:—"I have consequently executed this *will* that it may always be carried out and enforced after my death." In the waqf-namah moreover he states his intention to execute a will. In it is the following direction, *viz.* "after me (Faiyaz Ali) everything shall always be done in accordance with the terms specified in the will which I will execute hereafter." The document being a will it was open to the testator at any time during his life to revoke it, and if there was not a binding dedication of

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his property already created by the waqf-namah, to make any disposition of, or give any other directions he might please in regard to, his property. Let me then first consider the question whether, independently of the will, the waqf-namah, according to the Shia law, constituted a valid and binding dedication of the property. The only dedication purported to be made by it is a dedication "to Hazrat Imam Husain," the motive expressed being "to obtain benefit in the next world." The objects for which the dedication is made are nowhere stated in the instrument, but it is stated that the property is under no circumstances to be made the subject of inheritance. To discover the objects of the waqf, one must turn to the will. Now to constitute a valid waqf, there must be a dedication of property to God, or to religious or charitable purposes. This was so decided in the case of *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla* (1), a decision which was adopted by a Divisional Bench of the High Court at Calcutta in the case of *Mahomed Hamidulla Khan* v. *Lotful Huq* (2), in which the alleged waqf had for its objects nothing connected with the worship of God or religious observances, and provided only in a remote contingency for the poor. It was in fact a perpetuity for the benefit of the waqif's daughter and her descendants. In the case to which I have referred of *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla*, Melville, J., in the course of his judgment, remarks as follows:—"We think that it is necessary, in order to constitute a waqf, that the endowment should be to religious and charitable uses; and that it is not sufficient that the mere term 'waqf' should be used in the grant. To hold otherwise would be to enable every person by a mere fiction to create a perpetuity of any description." Ayyar, J., in the case of *Pathukutti* v. *Avathalakutti* (3), remarks in his judgment:—"It seems to me that unless the ultimate application of the property to religious or charitable use can be predicated with certainty from the deed of settlement, it cannot be said that one essential ingredient, *viz.* application to charity, is not wanting, and that a valid waqf is created." Ameer Ali, J., in his learned treatise on Muhammadan Law, in dealing with the Shia law

(1) (1873) 10 Bom., H. C. Rep., 7. (2) (1881) I. L. R., 6 Calc., 744.
(3) (1888) I. L. R., 13 Mad., 66.

relating to waqf, states that "with the exception of Ibn Junaid most of the writers are agreed in holding that a dedication, when the object is not mentioned either expressly or impliedly, is void" (Muhammadan Law, Vol. 1, p. 406), and Baillie, in his Digest of Muhammadan Law (p. 217, Vol. 2, 2nd edition), observes that "if a man should make an appropriation without mentioning its objects the appropriation would be void."

In Mr. Shama Churun Sircar's Tagore Law Lectures of 1874, at page 467, the principle is thus expressed under the heading "Conditions required of the object of waqf, number DCCCXXVIII. He (in whose favour a waqf is made) must be in existence, capable of owning property and *distinctly indicated;* he must not be one in whose favour it is unlawful to make waqf." In his treatise on Muhammadan Law (2nd Ed., Vol. I, p., 401) Mr. Justice Ameer Ali gives as one of the four requisites concerning the *maukoof-alaih*, or beneficiary, that he must be *muyyin*, or specified. Turning now to the waqf-namah in the present case, we find that while the motive of the dedication is stated by Faiyaz Ali Khan as being to protect his property, and the dedication is made to Hazrat Imam Husain "in order to obtain benefit in the next world," no object whatever of the waqf is specified. The dedication is not expressed to be made in the way of God or for any pious or charitable purpose. It is simply a dedication for such purposes and objects as the waqif should by will specify. It appears to me, therefore, that one of the essential conditions of a valid dedication is wanting, and that the waqf is consequently void, unless it be that the will can be called in to supplement the provisions of the waqf-namah and cure the defect which I have pointed out. Can this be done? I think not; and for this reason, that according to Shia law property cannot be made waqf by will. The law upon this subject is elaborately discussed by Mahmood, J., in his judgment in the case *Agha Ali Khan* v. *Altaf Hasan Khan* (1), in the course of which the learned Judge treats of the exact nature and constitution of waqf as understood in the Shia law, and points out how the Shia law recognises waqf, not as a unilateral disposition of property, as it is recognised in the Sunni law, but as a

(1) (1892) I. L. R., 14 All., 429.

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contract which, according to the requirements of juristic notions irrespective of either of these two systems, must be a transaction *inter vivos*, and this *ex necessitate rei*. According to Mr. Justice Ameer Ali, there are four essential requisites on which depends the legality of a waqf—(1) that it must be perpetual, (2) that it must not be contingent, (3) that possession must be given of the thing dedicated, or more properly, the property should cease to be the property of the donor, and (4) that the right of the donor should be entirely divested therefrom. Mr. Baillie in his treatise states these conditions thus:—(1) It (the waqf) must be perpetual, (2) absolute and unconditional, (3) possession must be given of the *maukoof* or thing appropriated, and (4) it must be entirely taken out of the waqif or appropriator himself. In the case before us, the second and fourth of these requisites appear to be wanting, for although the donor purported to dedicate the property when he executed the waqf-namah, and also purported to assume possession of it as mutawalli, no definite objects existed for which he was to hold possession. The waqf-namah was designed not to take effect until the death of Faiyaz Ali, although it assumed in some respects the form of a disposition *inter vivos*. The operation of the waqf was in fact suspended during the life of the waqif, and this we have held is not permitted by the Shia law in the unreported case of *Syeda Bibi* v. *Mughal Jan* (F. A. No. 300 of 1898, decided on the 24th January, 1902).*

Faiyaz Ali retained control over the property during his life, and could deal with it as he pleased. Only upon his death could his will have any operation. The operation of the dedication was in fact suspended during the life of Faiyaz Ali, and during this period Faiyaz Ali in effect reserved for himself the profits of the property as well as the power of revoking his will and disposing of the property as he might think fit. The waqf-namah was no more than a declaration by Faiyaz Ali that his property was waqf, and that he would by his will specify the object of the dedication. It seems to me that the object of the two documents not improbably was to enable him to retain unfettered control of the property during his life-time, and at the same time in case he did not revoke or alter his will, to secure the

* Since reported, *Supra* p. 231; S. C., Weekly Notes, 1902, p. 32.

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transmission of it to his descendants in perpetuity, trammelled only with some pious and charitable trust. If this was not his object, it is difficult to understand why he did not specify the objects of the dedication in the waqf-namah, instead of in an instrument drawn up and executed simultaneously with the waqf-namah.

For these reasons I am of opinion that the waqf-namah was an imperfect dedication of the property according to the Shia law, and that the will does not cure the defect inherent in it, and so no valid waqf has been created.

It is unnecessary for me to deal with any other aspect of the case; but I may observe that if the waqf-namah and the will can be read together, as my brother Burkitt considers that they can, I should have difficulty in coming to any other conclusion than that at which he has arrived, namely, that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family. The appeal will therefore be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C. 1901 *November* 14, 15. 1902 *February* 22.

CHANDIKA BAKHSH (DEFENDANT) *v.* MUNA KUNWAR (REPRESENTATIVE OF RATAN SINGH) AND OTHERS (PLAINTIFFS) AND DRIGBIJAI SINGH (DEFENDANT) *v.* MUNA KUNWAR (REPRESENTATIVE OF RATAN SINGH) AND OTHERS (PLAINTIFFS).*

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu Law—Custom - Mitakshara and Mayukha Schools of Hindu law—Proof of family custom at variance with Hindu Law—Governing law of migrating families.

A family custom alleged to exist amongst the Ahban Thakurs of Oudh, in derogation of the ordinary Mitakshara law in force there, that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor was held by the Judicial Committee not to be proved by four instances of the custom of comparatively modern date, which their Lordships found to be the only portions of the evidence adduced which supported it.

APPEALS from judgments and decrees (9th and 30th August 1898) of the Judicial Commissioners of Oudh reversing two decrees (15th June 1896) of the Subordinate Judge of Sitapur.

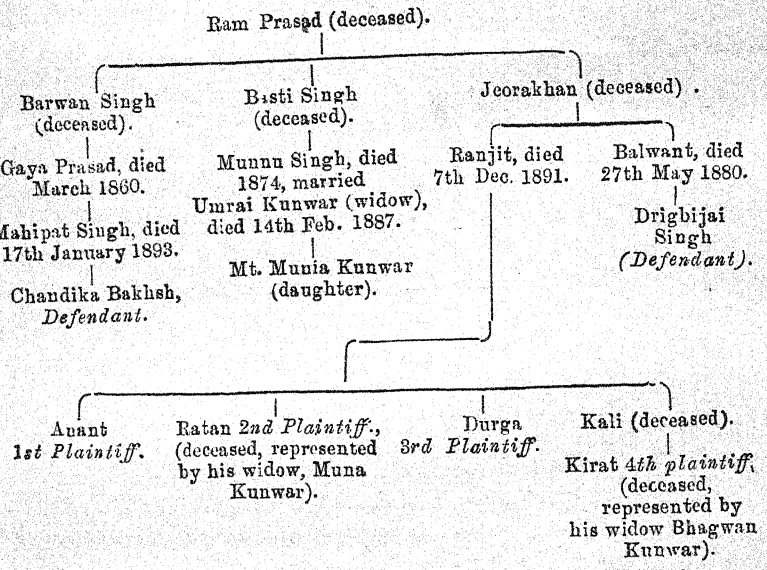
* *Present*:—LORD MACNAGHTEN, LORD ROBERTSON, and LORD LINDLEY.

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The parties to these appeals were Ahban Thakurs, a tribe which, coming originally from Gujrat, had settled in Oudh many centuries ago. The suits out of which the appeals arose were brought by the respondents as next heirs of one Munnu Singh, a divided member of the family, to recover his property on the death of his widow, Umrai Kunwar. The property in suit consisted of shares in eleven villages which had been held by Munnu Singh as his separate estate until his death on 21st January 1874, and afterwards by his widow until she died on 14th February 1887.

The relationship of the parties in the litigation is shown by the following pedigree:—



It was undisputed that daughters did not succeed, so that on the death of Umrai Kunwar, the nearest heir under the Mitakshara law prevailing in Oudh was Ranjit Singh, the father of the plaintiffs. A custom, however, was set up by the defendants that among the Ahban Thakurs, on the death of one of several brothers without direct heirs, the descendants of the other brothers took equally without reference to their nearness to the common ancestor. In accordance with this custom Mahipat Singh and Drigbijai Singh would succeed simultaneously with Ranjit Singh, and the property would be divided *per stirpes*.

On the death of Umrai Kunwar it appeared that disputes arose between the claimants to the estate, which resulted in the attachment of the property now in suit under section 146 of the Criminal Procedure Code (Act No. X of 1882). Subsequently the tahsildar was directed to effect a compromise, if possible, and eventually an arrangement was come to that Ranjit Singh should take a four-anna share, Drigbijai Singh a four-anna share, and Mahipat Singh an eight-anna share in Munnu Singh's property. An order to this effect was made by the Deputy Commissioner on 11th November, 1887, and the property released from attachment, the shares of Ranjit and Drigjibai being placed in charge of the Court of Wards under whose management their estates already were.

Ranjit Singh died on 7th December, 1891, and was succeeded by his sons Anant, Ratan and Durga and by his grandson Kirat, whose father Kali had predeceased Ranjit Singh. Mahipat died on 17th January, 1893, and was succeeded by his son Chandika Bakhsh. In March, 1893, Ranjit Singh's estate was released from the Court of Wards, and on the 27th April, 1895, the plaintiffs, the sons and grandson of Ranjit, brought the suits out of which the present appeals arose to recover from Chandika Bakhsh and Drigbijai Singh the shares they had taken of Munnu Singh's estate, to which the plaintiffs claimed that Ranjit Singh was under the Mitakshara law alone entitled to succeed on the death of Umrai Kunwar.

The main defence in both suits was that the succession was governed by the special custom already mentioned, and not by the ordinary law of the Mitakshara. Other grounds of defence were raised, but they were all decided against the defendants by both the Lower Courts and were not raised in the present appeals.

The Subordinate Judge held that the custom set up by the defendants was proved, but that the succession under it was *per capita* and not *per stirpes*. In the suit against Chandika Bakhsh for an eight-anna share of the property the Subordinate Judge gave the plaintiffs a decree for a two-anna eight pie share, that being the excess held by Chandika over the one-third share to which he was entitled. The suit brought against Drigbijai for a four-anna share of the property was dismissed with costs.

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On appeals preferred to the Court of the Judicial Commissioner, that Court held that the custom set up by the defendants had not been proved, and therefore reversed the decrees of the Subordinate Judge and decreed the plaintiffs' claim in each case in full.

The material portion of the judgment of the Judicial Commissioners in the case against Chandika Bakhsh as to the custom set up was as follows :—

"I pass on to consider the question whether the Hindu Law of the *Mitakshara* regarding inheritance has been superseded or modified by a custom binding upon the parties. The rule of succession which is alleged by the defendant to be binding upon Ahban Thakurs is that sons of a deceased brother, cousin, uncle or nephew of the propositus are entitled to stand in the shoes of their father and inherit along with their father's brother. The learned Subordinate Judge relied upon the *wajib-ul-arzes* of Shahpur, Kunwa Danda, and Bidhipur, and upon the judgment of the Subordinate Judge in Bhagwant Singh and Drigpal *v.* Raj Rani, dated July 22nd, 1881, in support of his finding that the custom had been established. The material portion of the *wajib-ul-arz* of Shahpur is as follows:—'*bad marne aurat mazkur shauhar mutawaffi ke bhai bhatije aur dar surat na hone bhai bhatijon ke jo waris karib ek jaddi shauhar ka ho hissa pawega.*' The *wajib-ul-arz* of Bidhipur is almost the same word for word. This passage literally translated is as follows:—'After the death of the said woman (or widow) the brothers and nephews of her deceased husband and on failure of brothers and nephews, the nearest heir of the same stock will get the share (of the deceased).' It is conceded that the word 'and' must be inserted between 'brothers' and 'nephews' although in the original there is no conjunction between the words.

"The defendant's learned counsel contends that the meaning is that brothers and nephews should succeed together. This is to my mind a forced construction. Such a sentence as the above is often found in *wajib-ul-arzes* and is the language usually employed to denote that brothers and in default of brothers, nephews may succeed, and I think that that is the meaning here. But even if this contention be admitted as sound these documents will not avail the defendant. The word '*bhai*' is no doubt frequently used to denote both brothers and cousins, but it cannot be so understood here else it would be unnecessary to make further provision for the succession of the nearest heir of the same stock. Mahipat Singh, therefore, was not a brother of Munnu Singh within the meaning of this *wajib-ul-arz*. The *wajib-ul-arz* of Kunwa Danda contains nothing that can be tortured into a record of the alleged custom.

"The judgments in *Bhagwant Singh* and *Drigpal* v. *Raj Rani* do not help the defendant's case. Mandhata, Mahipat, Suphal and Bhagwant were brothers. Drigpal was the son of Mandhata. It appears that at the regular settlement Mahipat was found to be in possession of Suphal's *sir*. Bhagwant and Drigpal brought a suit against Mahipat, which resulted in an arbitration award and a

decree, dated January 1866, by which it was declared that Mahipat and his wife who were childless should retain possession for their lives. Many years later Raj Rani after Mahipat's death executed a mortgage of the property, whereupon Bhagwant and Drigpal sued her and her mortgagee for a declaration that the mortgage would be ineffectual against them after her death. She pleaded that uncle and nephew could not join as plaintiffs. The Subordinate Judge disposed of this plea with the remark that Bhagwant and Drigpal were entitled to sue together both under the decree of 1866 and by custom; in proof of the custom he referred to the decree of the Settlement Court and to the evidence of a solitary witness. He added that Bhagwant at all events had a right of suit. On appeal the District Judge did not deal with the question of custom at all. The judgment of the Subordinate Judge cannot be relied upon as a pronouncement in favour of the existence of such a custom as that pleaded by the defendant. The decree of the Settlement Court is not in evidence, and there is nothing to show that the award of the arbitrators was based upon the custom alleged by the present defendant. It is remarkable that the *wajib-ul-arzes* of the villages in suit do not mention the custom; the parties who attested them seem to have induced the Settlement Officer to record what suited their purpose.

"This exhausts the documentary evidence which is supposed to tell in favour of the custom.

"Before discussing the oral evidence I must notice a circumstance which is relied upon by the defendant as rendering it probable that such a custom would be observed by Ahban Thakurs. It appears that the Ahban Thakurs now found in Oudh are the descendants of families which migrated to Oudh several centuries ago from Gujrat. According to the Vyavahara Mayukha, which is of paramount authority in Gujrat, the sons of a brother who is dead are allowed to share along with surviving brothers. This is supposed to explain the origin of the custom set up in this case. Babu Sri Ram pointed out that the Mayukha was the work of Nilakantha, who lived about 1600 A.D., *id est*, long after the migration of the Ahban Thakurs to Oudh. This may not be a sufficient answer, for the law in force in Gujrat at the time of migration may have been the same as that laid down in the Mayukha some centuries later. If the custom set up in this case owes its origin to the law in force in Gujrat so many centuries ago and has been observed ever since one would expect to find some mention of it in the *wajib-ul-arzes*.

"Moreover the rule of the Mayukha that sons of a deceased brother succeed along with surviving brothers does not appear to enable sons of deceased cousins, uncles or nephews to succeed along with surviving cousins, uncles or nephews. I am therefore of opinion that the rule laid down in the Mayukha cannot be held to establish an antecedent probability in favour of the much more comprehensive rule pleaded by the defendant."

The Court then discussed the oral evidence and went in detail through the 18 instances put forward by the defendant in proof of the custom, and in conclusion said:—

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"In the result, then, I am of opinion that instances 9, 14, 15 and 17 have not been established, that Nos. 6 and 13 may be taken as proved, that Nos. 3 and 18 may be, but are not necessarily, true examples of the custom, and that Nos. 1, 2, 4, 5, 7, 8, 10, 11, 12 and 16 must, for various reasons, be regarded as doubtful. It is noticeable that instances 1 to 11 and 14 are said to have occurred in Kunwa Danda, Shahpur and Bidhipur, though, as already explained, the *wajib-ul-arzes* of those villages contain no record of the alleged custom. If the conclusions at which I have arrived are correct it is obvious that there is not on the record of this case sufficient evidence that the alleged customary rule of inheritance is binding upon the parties. Even if it be assumed that all the 18 instances have been established, I consider that the evidence must on the authorities be held insufficient. It has been established by a long series of authorities that in order to establish a tribal or family custom at variance with the ordinary law of inheritance it is necessary to show that the usage is ancient and has been invariable, and it must be established by clear and unambiguous evidence."

IN the case against Drigbijai Singh the judgment of the Subordinate Judge was reversed on the same grounds.

Chandika Bakhsh and Drigbijai brought separate appeals to His Majesty in Council.

In the first appeal—

Mr. *Leslie DeGruyther*, for the appellant Chandika Bakhsh.

Mr. *J. D. Mayne*, for the respondents.

In the second appeal—

Mr. *G. E. A. Ross*, for the appellant Drigbijai Singh.

Mr. *C. W. Arathoon*, for the respondents.

In the first appeal—

Mr. *DeGruyther*, for the appellant contended that the succession in this case was governed by the special custom set up and not by the ordinary law of the Mitakshara. The parties, Ahban Thakurs from Gujrat, where the Mayukha law is in force, must be presumed to have brought that law with them when they migrated and settled in Oudh. The custom now contended for is founded upon the Mayukha. The rule in the Mayukha is to the effect that "sons of a deceased brother succeed along with the surviving brothers" (see Stoke's Hindu Law, ch. iv., section 8, verse 17). "Brothers" is not confined to brothers proper, but extends to cousins, the rule of the Mayukha having been naturally extended to include more remote relationships than actual brothers (West and Buhler's Hindu Law, 3rd Ed. Book I, p. 108). In this case the appellant contends that cousins and cousins' sons

succeed together, and it is submitted that the evidence supports that contention. There are 18 instances in which the custom has been observed. As to proof of a custom *Garuradhwaja Prasad Singh* v. *Superundhwaja Prasad* (1) was referred to. The Subordinate Judge was in error in holding that the rule of succession is *per capita*, and not *per stirpes*; but even if the division were made *per capita*, the respondents are not entitled to so much as has been allotted to them. As to the effect in evidence of the *wajib-ul-arzes*, or administration papers, *Uman Parshad* v. *Gandharp Singh* (2) and *Lekraj Kuar* v. *Mahpal Singh* (3) were referred to.

Mr. *J. D. Mayne* for the respondents contended that the special custom set up had not been established: the evidence in support of it was unsatisfactory and insufficient to prove such a custom, which was one in derogation of the ordinary law. The alleged custom had only been followed in three out of the eighteen instances adduced in support of it, and those are of comparatively modern date and are insufficient to establish it, one of the essential requisites of a custom being that it is ancient. All the remaining instances merely follow the rule of succession laid down in the Mayukha. The extension of that rule contended for by the appellant is not in accordance with the principles of the Hindu law and should not be allowed. The following cases and authorities were cited:—Stoke's Hindu law, ch. IV., section 8, verse 17; Stoke's Hindu Law, pp. 443, 445, verse 8; Mitakshara, ch. II., section 4, verse 1; West and Bühler's Hindu Law, 3rd Ed., Book I., pp. 107, 108; *Jamiyatram* v. *Bai Jamna* (4); *Lakshmi Bai* v. *Ganpat Moroba* (5) and *Sant Kumar* v. *Deo Saran* (6).

Mr. *DeGruyther* replied—

1902: 22nd February: The Judgment of their Lordships was delivered by LORD MACNAGHTEN:—

The question involved in these appeals may be disposed of in a few words. In the first case the Subordinate Judge of Sitapur found in favour of the appellant (the principal defendant

(1) (1900) I. L. R., 23 All., 37; L. R., 27 I. A., 238.
(2) (1887) I. L. R., 15 Calc., 20 (28); L. R., 14 I. A., 127 (134).
(3) (1879) I. L. R., 5 Calc., 741; L. R., 7 I. A., 63.
(4) (1864) 2 Bom., H. C. R., 11.
(5) (1868) 5 Bom., H. C. R., O. C. 128 (139).
(6) (1886) I. L. R., 8 All., 365 (369).

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in the suit) on the ground of an alleged family custom that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor. The Judicial Commissioners reversed this decision and adjudged the estate in dispute to the respondents, who were plaintiffs in the suit, holding that the alleged custom had not been made out.

The parties to this litigation are Ahban Thakurs. It seems that the tribe known in Oudh as Ahban Thakurs came originally from Gujrat and settled in Oudh many centuries ago. In Gujrat the Mayukha is recognised as authority of paramount importance when it differs from the Mitakshara. According to the Mayukha sons of a brother who is dead share along with surviving brothers. The rule, however, as found in the Mayukha does not go beyond brothers and brothers' children. Although the migration of the Ahban Thakurs took place before the Mayukha was written it may well be that the rule was in force in earlier times and that on this point the Mayukha only embodied and defined a pre-existing custom.

The argument of the learned counsel on behalf of the appellant was to this effect:—It is to be assumed (he said) that the tribe known as the Ahban Thakurs brought with them from Gujrat the law of the Mayukha: it is quite true that the Mayukha deals only with the case of a deceased brother; but it is a legitimate, and under the circumstances a natural, extension of the doctrine to apply it to cases of more distant relationship. It is a development of the law which might be expected to grow up among a tribe settled in a foreign land and there living apart. In support of the appellant's claim there was in evidence a judgment which was not much to the point, some oral testimony which was anything but satisfactory, certain *wajib-ul-arzes* which on examination are found to prove nothing, and 18 instances of succession which were put forward as demonstrating the existence of the alleged custom. The Judge of first instance considered these instances conclusive. The Judicial Commissioner who delivered the judgment of the Court examined them in detail. He found that four had not been established, that ten must be

regarded as doubtful, that two were not necessarily true examples of the alleged custom, and that the remaining two might be taken as proved. But his opinion was that if all the 18 instances had been established, the evidence must on the authorities still be held insufficient.

Mr. Mayne for the respondents contended that the suggested extension of the Mayukha rule would be abhorrent to the fundamental principles of Hindu law. He was willing to concede for the purposes of this case that the Ahban Thakurs settled in Oudh were governed by the Mayukha; but if that position was accepted, it was, he said, destructive of the appellant's case. He discussed the 18 instances and showed that all but three were true examples of the Mayukha rule and nothing more. This result was not really contested by the learned counsel for the appellant in his reply. He could do no more than add one of the other cases as an instance of the alleged custom, contending on the evidence that it was not simply an example of the Mayukha rule.

The result is that in support of the alleged custom four instances at most can be adduced, and those of a comparatively modern date, and that there is no other evidence.

It is obvious that a family custom in derogation of the ordinary law cannot be supported on so slender a foundation.

The appeal of Drigbijai Singh fails on precisely the same ground.

Their Lordships will therefore humbly advise His Majesty that these appeals should be dismissed. In each case the costs will be borne by the appellant.

Appeals dismissed.

Solicitors for the appellant, Chandika Bakhsh—Messrs. *Watkins* and *Lempriere*.

Solicitors for the appellant, Drigbijai Singh—Messrs. *Barrow Rogers* and *Nevill*.

Solicitors for the respondents in both appeals—Messrs. *T. L. Wilson & Co.*

J. V. W.

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February 14.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

SHEORAJ SINGH (JUDGMENT-DEBTOR) *v.* KAMESHAR NATH AND ANOTHER (DECREE-HOLDERS).*

Execution of decree—Limitation—Res judicata.

Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

An application for execution of a decree was struck off on the 15th of January, 1894. The next application for execution was not made until the 29th of May, 1897. Notice of this application was served on the judgment-debtors, and they filed objections, but on the day fixed for hearing failed to support them, and they were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holders. *Held* that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect to the application of the 29th of May, 1897, as a bar to the execution of the decree. *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1), *Behari Lal* v. *Abdul Majid* (2), *Lakshmanan Chetti* v. *Kuttayan Chetti* (3), *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry* (4) and *Dhonkal Singh* v. *Phakkar Singh* (5) referred to. *Tileshar Rai* v. *Parbati* (6) and *Onkar Singh* v. *Mohan Kuar* (7) distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellant.

Pandit *Sundar Lal*, Pandit *Moti Lal Nehru* and Pandit *Tej Bahadur Sapru*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This is an appeal from the order of the Subordinate Judge of Aligarh disallowing the objections of Raja Sheoraj Singh to the execution of a decree recovered by the respondent against the late Raja Shankar Singh, the father of Raja Sheoraj Singh. A number of proceedings in execution of this decree were taken, which it is unnecessary to state in detail. Suffice it to give the following

* First Appeal No. 166 of 1900 from a decree of Munshi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 14th May, 1900.

(1) (1881) L. R., 8 I. A., 123.
(2) Weekly Notes, 1897, p. 29.
(3) (1901) I. L. R., 24 Mad., 669.
(4) (1900) I. L. R., 28 Calc., 122.
(5) (1893) I. L. R., 15 All., 84.
(6) (1893) I. L. R., 15 All., 198.
(7) Weekly Notes, 1898, p. 96.

particulars:—On the 31st of January, 1890, the first application for execution was made, and two villages were attached in execution. Raja Shankar Singh died on the 24th of August, 1891, and the names of his sons, Raja Sheoraj Singh and Raja Maharaj Singh, were substituted as his legal representatives. On the 2nd of April, 1892, an arrangement was come to between the decree-holders and Raja Sheoraj Singh, whereby it was agreed that the amount of the decree should be paid off by six instalments, and that in default of payment of any instalment the execution proceedings should be revived and carried out. It was also agreed that the two villages which had been attached should remain hypothecated (this is the word used) until the instalments had been paid. The decree had been sent for execution to the Collector of Etah, and on the 16th of May, 1892, the execution proceedings were sent back to the Civil Court. Raja Sheoraj Singh, upon the compromise being effected, paid the sum of Rs. 3,231 into Court in satisfaction of interest due on foot of the decree. A payment order was passed in favour of the decree-holders on the 18th of June, 1892, and on the 13th of July, 1892, they obtained payment of this amount. The sanction of the Court which passed the decree was not obtained to the compromise as required by section 257A of the Code of Civil Procedure, and consequently it was void. Two instalments of Rs. 5,000 each were paid on foot of the decree, and in accordance with the compromise arrangement on the 24th of March, 1893 and 15th of January, 1894, but no further instalment was paid; and in consequence of this default on the 29th of May, 1897, the decree-holders made a further application to the Court for execution of the decree. Notice was duly given to the judgment-debtors under section 248 of the Code of Civil Procedure, and Raja Sheoraj Singh, as also his brother, filed objections. The objectors failed to appear in support of their objections on the day fixed by the Court for the disposal of them, namely, the 29th of December, 1897. Their pleader stated to the Court that he had no instructions, and the objections were dismissed. There has been no appeal from this order. The process fees, which were directed to be paid for issue of further execution, not having been paid in due course, the execution

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proceedings were struck off on the 8th of June, 1898. This necessitated a further application for execution, which was made on the 14th of October, 1898, and granted. Again the execution proceedings were struck off owing to the neglect of the decree-holders to file some khewats, and on the 19th of December, 1898, the application for execution, which is now being resisted by the judgment-debtors, was made. Of the objections which Raja Sheoraj Singh has filed, three only have been pressed, and they are these:—(1) That the application for execution of the decree made on the 29th of May, 1897, having been made more than three years after the previous application of the 13th of January, 1890, was barred by limitation; (2) that the decree was incapable of execution by reason of the compromise of the 2nd of April, 1892, and (3) that the attachment was made after the death of the judgment-debtor, Raja Shankar Singh, and consequently was not binding on the appellant, who took the property by right of survivorship and not by right of inheritance. These same objections were raised by Raja Sheoraj Singh on the occasion of the application for execution which was made on the 29th of May, 1897, and were dismissed; and it is now contended on the part of the decree-holders that, inasmuch as these objections have already been disposed of by an order against which there has been no appeal, the matter is *res judicata*, and the objections cannot be reagitated. Reliance is placed upon several authorities to which we shall refer. In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*, (1) their Lordships of the Privy Council held that, although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for such execution has been made by a competent Court having jurisdiction to try whether it was barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid. Sir Barnes Peacock in delivering the judgment of their Lordships in the course of his judgment observed:—"The Subordinate Judge had jurisdiction upon the petition of the 8th of October, 1874 (*i.e.* a petition to attach properties), to determine whether the decree was barred on the 8th of October, 1871, and he made an order

(1) (1881) L. R., 8 I. A., 123.

that an attachment should issue. He, whether right or wrong, must be considered to have determined that it was not barred. A Judge, in a suit upon a cause of action, is bound to dismiss the suit or to decree for the defendant if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal, and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." Now in the case before us the Subordinate Judge dismissed the plaintiff's objections on the 20th of December, 1897. Whether rightly or wrongly, he must have considered that the application was not barred by limitation, for he allowed execution to issue, and by a subsequent order of the 17th of March, 1898, directed the pleader for the decree-holders to pay the costs of attachment on or before the 21st of March, 1898. The order of the 20th of December, 1897, was acquiesced in by the appellant and was acted on. It appears to us that the ruling of their Lordships is applicable to and governs this case.

In a case which was decided in this Court a similar question arose, namely, the case of *Behari Lal* v. *Majid Ali* (1). In that case one Gauri Shankar obtained a money decree against Majid Ali. Gauri Shankar having died, one Behari Lal alleging that he was the brother of Gauri Shankar, and one Musammat Sonkali alleging that she was the widow of a deceased brother of Gauri Shankar, applied for execution of the decree by arrest of Majid Ali. Notice was issued to Majid Ali under section 248 of the Code of Civil Procedure, and was served upon him, but he failed to appear, and an order for arrest was made. Majid Ali could not be found, and the warrant was not executed. Subsequently, on the 2nd of August, 1893, Behari Lal and Musammat Sonkali presented another application for execution of the decree by the arrest of Majid Ali. On this occasion Majid Ali appeared and filed objections to the right of Behari Lal and Musammat Sonkali to have execution of the decree. The first Court made an order for execution. The second Court allowed the objections of Majid Ali and dismissed the application. On second appeal to the High Court, Edge, C.J. and Blair, J., held, upon the principle laid

(1) Weekly Notes, 1897, p. 29.

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down by their Lordships of the Privy Council in the case of *Ram Kirpal* v. *Rup Kuari* (1), that Majid Ali was not, upon the second application made for execution, entitled to dispute the right and competence of Behari Lal and Musammat Sonkali to have execution of the decree as representatives of Gauri Shankar; that their right to execute the decree was established when an order for execution was passed on the first application, and that the principle of *res judicata* applied. So in the case before us, the objector having failed to appear and support his objections on the 29th of December, 1897, and the same having been dismissed, he is estopped from now setting up the same objections. In the case of *Lakshmanan Chetti* v. *Kuttayan Chetti* (2), this question was considered. In that case a decree had been obtained on the 16th of March, 1893, and a petition in execution was presented on the 8th of February, 1894. On the 2nd of July, 1897, that is, more than three years after the presentation of the petition of the 8th of February, 1894, the next petition in execution was presented, when the judgment-debtor, though he had notice of the application, did not raise the defence of limitation. An order was passed on the petition for the issue of a warrant for the arrest of the defendant, and the warrant was duly issued. Within three years of the making of this application a further application in execution was made, when it was objected that as the application in 1897 had been presented more than three years after the previous application in 1894 it was barred, and that in consequence the further application must also be barred. It was held by Davies and Moore, JJ., that it was not open to the judgment-debtor then to raise the objection that the application of 1897 was barred and that this question was *res judicata*. These decisions are based on the ruling of their Lordships of the Privy Council in the case to which we have referred. On behalf of the appellant two decisions of this High Court have been relied on. The first is the concluding paragraph (at page 204) of the judgment pronounced by one of us in the case of *Tileshar Rai* v. *Parbati* (3). That case, however, is distinguishable, as it appears that the date fixed for hearing the objections of the judgment-debtors

(1) (1883) I. L. R., 6 All., 269. (2) (1901) I. L. R., 24 Mad., 669.
(3) (1893) I. L. R., 15 All., 198.

to execution was a Sunday, and that their objections were rejected on the following day in their absence, they having had no notice to appear on that day. That was the reason why the Bench which heard that case held that the objection raised by the judgment-debtors had not been judicially disposed of. Had the attention of the Bench been called to the rule laid down in *Mungul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry* (1) it probably would have come to a different conclusion. The second case which is relied on for the appellant is the concluding portion (page 97) of the judgment in *Onkar Singh* v. *Mohan Kuar* (2) to which one of us was a party. That case also might be distinguished [as in the recent case of *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry* (3)] from the present by the fact that on the day fixed for disposing of an objection to execution raised by the judgment-debtor, neither the latter nor the decree-holder appeared, and the objections were struck off without any judicial determination. As the case, however, was shortly afterwards transferred to the Collector under section 320 of the Code of Civil Procedure for execution by sale of the hypothecated property, the Subordinate Judge must be held to have made an order for execution of the decree, an order which, whether right or wrong, was valid, so long as it stood unreversed on appeal. Neither the then recent case of *Behari Lal* v. *Majid Ali* (1897, November 29th) mentioned above nor the judgment of their Lordships of the Privy Council mentioned above was cited in argument, and the Bench lost sight of the rule that once an execution Court has passed an order for execution in favour of the decree-holders the only remedy left to the judgment-debtor is by way of appeal. We are of opinion that the true principle applicable to objections to execution raised by judgment-debtors is that laid down in the case just cited, and that the principle on which the rule as to decree-holders in *Dhonkal Singh* v. *Phakkar Singh* (4) is founded, does not apply to the disposal of such objections. For the foregoing reasons we are of opinion that the appellant was not entitled to raise the objections which he filed to the execution of the decree of the defendants.

(1) (1881) L. R., 8 I. A., 123.
(2) Weekly Notes, 1898, p. 96.
(3) (1909) I. L. R., 28 Calc., 122.
(4) (1893) I. L. R., 15 All., 84.

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On this ground his appeal fails. It is unnecessary for us to determine the other questions which have been discussed in the course of the arguments.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

1902 *February* 15.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

LALTA PRASAD AND ANOTHER (PLAINTIFFS) *v.* SADIQ HUSEN (DEFENDANT).*

Cause of action—Assignment of decree for costs—Costs realized by assignee—Decree reversed in appeal—Suit by successful appellants to recover from the assignee the costs realized by him.

Certain appellants in the High Court obtained from that Court a decree dismissing the respondents' plaintiffs' suit with costs. That decree for costs was assigned by the decree-holders, and the assignee took out of Court in execution thereof the money which had been paid in satisfaction of it by the judgment-debtors. Subsequently that decree was reversed by the Privy Council, and the plaintiffs obtained a decree in their favour with costs in all Courts. After an infructuous attempt to get a portion of those costs from the assignee by way of execution of the order of the Privy Council, the decree-holders filed a separate suit against him for their recovery. *Held*, that the decree-holders had no cause of action for a suit to recover from the assignee the costs realized by him in the manner above described.

THE facts of this case will be found stated in the report of the case of *Sadiq Husain* v. *Lalta Prasad* (1), but briefly they were as follows:—

On the 21st of July, 1888, Lalta Prasad and Har Prasad obtained a decree for sale on a mortgage from the Court of the Subordinate Judge of Bareilly against Aziz-ud-din Ahmad and Hafiz-ud-din Ahmad. The defendants appealed, and on the 16th of March, 1891, the High Court set aside that decree, and dismissed the plaintiffs' suit with costs.

This decree for costs the defendants assigned to one Sadiq Husen, who applied for execution thereof, and realized the amount of costs decreed.

The plaintiffs appealed from the decree of the High Court to the Privy Council, and on the 5th of April, 1895, the Privy

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* First Appeal No. 61 of 1899, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 3rd February 1899.

(1) (1897) I. L. R., 20 All., 139; S. C., W. N. 1897, p. 222.

Council decreed the appeal and restored the decree of the Court of first instance in favour of the plaintiffs.

The plaintiffs did not make Sadiq Husen a party to their appeal to Privy Council. Having obtained their decree, however, the plaintiffs attempted to execute it as regards the costs realized by virtue of the assignment to him of the decree of the High Court against Sadiq Husen. In this attempt they were unsuccessful, and they next filed a separate suit against Sadiq Husen for the recovery of those costs with interest. The Court of first instance (Subordinate Judge of Bareilly) dismissed the suit, and the plaintiffs thereupon appealed to the High Court.

Mr. *D. N. Banerji*, for the appellants.

Mr. *A. E. Ryves* and Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal against the decree of the Subordinate Judge of Bareilly dismissing plaintiffs' suit with costs.

It is unnecessary that we should set out the facts of this case at length; they will be found fully detailed in the reported case of *Sadiq Husain* v. *Lalta Prasad* (1) of which this case is a sequel.

Suffice it to say that in that case the present appellants failed in their attempt to have execution of the decree of Her late Majesty in Council against Sadiq Husen, the respondent here. It was in that case held by a Bench of this Court, of which one of us was a member, that as Sadiq Husen was no party to the decree made by Her late Majesty in Council, that decree could not be executed against him. Being thus foiled in their attempt to proceed against the respondent by way of execution, the appellants have had recourse to this regular suit, by which they seek to recover from him Rs. 4,820-13, the amount of the costs in the Court of the Subordinate Judge in the suit of 1888, which they paid into Court in July, 1891, when the original decree of the first Court was reversed by this Court on March 16th, 1891, and they were ordered to pay that sum as their appellants' costs, and it was paid to the respondent Sadiq Husen pursuant to an assignment to him from the successful defendants-appellants

(1) (1897) I. L. R., 20 All., 139.

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Aziz-ud-din and Hafiz-ud-din. The plaintiffs here further ask for Rs. 4,068-11-6 interest by way of damages on the Rs. 4,820-13.

In our opinion the decree of the lower Court dismissing the suit is right. The appellants appear to us to be on the horns of a dilemma. If they sue the plaintiff as a party to the litigation, which ended with Her late Majesty's order in Council, the answer is complete and is twofold, namely, firstly, that in that case their suit is barred by the provisions of section 244 of the Code; and, secondly, that it is barred as a *res judicata* by the decree in the reported case mentioned above. If, on the other hand, they sue defendant as a stranger to that litigation, it is difficult to see what cause of action they have against him. The appellants seem to have perceived this difficulty, for all they say is that "they are entitled under the law and equity to recover." We fail to see what are the facts on which the appellants can found their cause of action. What happened is, that the respondent Sadiq Husen purchased for consideration (as found by the learned Subordinate Judge in this case) the right to receive from the Court a sum of money, being the costs due from appellants to Aziz-ud-din and Hafiz-ud-din, and he received those costs in cash from the present appellants through the Court in due process of execution. Now if Aziz-ud din and Hafiz-ud-din, instead of assigning to Sadiq Husen before execution, had themselves executed the decree for costs, and on receipt of the money had handed it over to respondent there and then, would the appellants here have had any cause of action against Sadiq Husain when the decree, in execution of which those costs had been paid, was subsequently reversed? We think not, and we cannot see what difference it makes that Sadiq Husen, acting under the assignment of those costs to him, asked the Court to pay them to him; for we must assume that Sadiq Husen did not thereby become a party to the suit or a representative of a party. As the learned Subordinate Judge finds that consideration passed for the assignment, it may well be that Hafiz-ud-din and Aziz-ud-din were in debt to Sadiq Husen, and discharged the debt by the payment made to Sadiq Husen through the Court, on the authority conveyed by their assignment. But how does that

give any cause of action to the appellants against Sadiq Husain? The order of Her late Majesty in Council gave the appellants a decree against Hafiz-ud-din and Aziz-ud-din for the costs incurred by them in all three Courts. We cannot understand why, having that decree in their hands, the appellants prefer to proceed against Sadiq Husen for a considerable portion of those costs instead of against Hafiz-ud-din and Aziz-ud-din. The appellant's decree is against the latter and not against Sadiq Husen, and that decree gives them a right to recover from Hafiz-ud-din and Aziz-ud-din the very sum which they now seek to recover from Sadiq Husen.

In our opinion the appellants have not shown any tangible cause of action against the respondent. We therefore dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1902 *February* 17.

COLLECTOR OF JAUNPUR (PETITIONER) *v.* BITHAL DAS AND ANOTHER (OPPOSITE PARTY).*

Civil Procedure Code, section 244—*Execution of decree—Question relating to the execution, discharge or satisfaction of the decree—Application to recover proceeds of sale from decree-holder after sale has been set aside.*

Held that an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside, is an application which falls within section 244 of the Code of Civil Procedure.

Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties after the decree has been executed as it does to a dispute arising between them previous to execution.

Imdad Ali v. *Jagan Lal* (1), *Dhan Kunwar* v. *Mahtab Singh* (2) and *Partab Singh* v. *Beni Ram* (3) referred to. *Ramchhaibar Misar* v. *Bechu Bhagat* (4) distinguished.

THE facts out of which this appeal arose were as follows:—

On the 21st of July, 1890, Bithal Das and Girdhar Das obtained a decree against Raja Harihar Dat Dube in the Court of the Subordinate Judge of Benares. The decree was sent for execution to the Court of the District Judge of Jaunpur and an eight-anna

* First Appeal No. 292 of 1900, from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 25th September 1900.

(1) (1895) I. L. R., 17 All., 478.
(2) (1899) I. L. R., 22 All., 79.
(3) (1878) I. L. R., 2 All., 61.
(4) (1885) I. L. R., 7 All., 641.

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share in Mauza Dilshadpur was attached. The judgment-debtor's brother Raja Shankar Dat Dube filed an objection under section 278 of the Code of Civil Procedure, but before that objection was decided the judgment-debtor died and was succeeded by the objector. The objector subsequently filed another objection under section 244 of the Code. This objection, as well as the objection under section 278, was decided against him on the 6th of September, 1892. Against the order disallowing the objection under section 244 an appeal was preferred, and, on the 5th of February, 1895, the High Court allowed the appeal and remanded the case under section 562 of the Code of Civil Procedure. In the result the objection of Raja Shankar Dat Dube prevailed, and by his order of the 25th of September, 1897, the District Judge declared that the property in question was not liable to sale. Meanwhile, however, the property had, on the 20th of March 1893, been actually sold and had been purchased by Munni Ram Darogha for Rs. 3,389, and the purchase money had been paid to the decree-holders Bithal Das and Girdhar Das.

In the present case the Collector of Jaunpur as Manager of the estate of Raja Sri Kishan Dat Dube, the successor in title of Raja Shankar Dat Dube, applied under section 244 of the Code of Civil Procedure to obtain a refund of the money paid to Bithal Das and Girdhar Das with interest.

The District Judge of Jaunpur dismissed the application, holding, first, that questions arising subsequent to sale could not be dealt with under section 244 of the Code, and secondly, that an application under section 244 could not be entertained unless execution proceedings were pending in the Court to which it was made.

From this dismissal the applicant appealed to the High Court.

Mr. *A. E. Ryves*, for the appellant.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the respondents.

BANERJI and AIKMAN, JJ.—The sole question which arises in this appeal is whether the application of the appellant was one under section 244 of the Code of Civil Procedure, and should have been adjudicated upon by the Court below under that section

The respondents obtained a simple decree for money against one Raja Hari Har Dat Dube, and in execution thereof caused certain property to be attached as the property of the Raja. Hari Har Dat Dube died during the pendency of execution proceedings, and his brother, Raja Shankar Dat Dube, whose estate is now represented by the appellant, was brought on the record as his legal representative. On the 4th of April, 1892, he preferred an objection respecting the application for the sale of the attached property, on the ground that the property sought to be sold belonged to him, and did not form a part of the assets left by Raja Hari Har Dat Dube. That objection was disallowed by the Court below on the 6th of September, 1892. On the 20th of March, 1893, the property was sold by auction and the proceeds of the sale were taken out of Court by the respondents on the 28th of September, 1893. Meanwhile Shankar Dat appealed to this Court against the order disallowing his objection, and it was during the pendency of this appeal that the property was sold. This Court, on the 5th of February 1895, set aside the order of the Court below, and remanded the case to that Court under section 562 of the Code of Civil Procedure. In the result the Court of first instance, on the 25th of September, 1897, upheld the objection of Shankar Dat, and ordered that the property in question should be released from attachment, declaring that it was incapable of being attached in execution of the decree. The present application was made for the refund of the sale proceeds, which the respondents withdrew from Court on the 29th of September, 1893.

The Court below has refused the application on the ground that it is not one to which section 244 of the Code of Civil Procedure relates. We are unable to agree with that view. The learned Judge was of opinion that the property having been sold and the decree having been satisfied no question relating to the execution, discharge or satisfaction of the decree could arise, and in support of his view he referred to the ruling of this Court in *Ramchhaibar Misr* v. *Bechu Bhagat* (1). That case, if carefully looked into, does not support the learned Judge's view. What was really decided in that case was, that after a sale any question which arose between the auction-purchaser and

(1) (1885) I. L. R., 7 All., 641

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judgment-debtor was not a question relating to the execution of the decree. The judgment in that case must be considered with reference to the facts which the Court had to deal with. We have a number of authorities of later date in which it was held that a question of the nature of that which arises in this case is one relating to the execution, discharge or satisfaction of a decree, although it arises after a sale has taken place under the decree; in other words, section 244 applies as well to a dispute arising between the parties after the decree has been executed, as it does to a dispute arising between them previous to execution. We need only refer to *Imdad Ali* v. *Jagan Lal* (1), and *Dhan Kuar* v. *Mahtab Singh* (2). The principle of the Full Bench ruling in *Partab Singh* v. *Beni Ram* (3), is also applicable. The mere fact that no execution case was pending before the Court below at the time when the appellant filed his application on the 27th of August, 1900, would not render section 244 inapplicable. The result is that we allow this appeal, set aside the order of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure, for disposal on the merits. The appellant will have his costs of this appeal. Other costs will follow the result.

Appeal decreed and cause remanded.

1902

February 18.

Before Mr. Justice Knox and Mr. Justice Blair.

IQBAL HUSEN AND OTHERS (DEFENDANTS) *v.* NAND KISHORE AND OTHERS (PLAINTIFFS).*

Evidence—Possession—Presumption—Evidence of possession of certain specific property treated as evidence of possession as regards an appendage to such property, though no definite acts of possession were proved as regards the appendage—Limitation.

Where, on the right to the produce of certain trees being called in question, it was found that the plaintiffs had not for twelve years previous to the filing of the suit done any specific acts indicating directly their possession of the trees, but that the trees nevertheless grew out of a wall which surrounded a garden in possession of the plaintiffs, it was *held* that the possession of the garden imported possession of the garden wall and of the trees springing out

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* Appeal No. 32 of 1901 under section 10 of the Letters Patent.

(1) (1895) I. L. R., 17 All., 78. (2) (1899) I. L. R., 22 All., 79.
(3) (1878) I. L. R., 2 All., 61.

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of the wall, and the suit was not barred by limitation. *Rajkumar Roy* v. *Gobind Chunder Roy* (1), *Asghar Reza* v. *Mehdi Hossein* (2), and *Mohima Chunder Mozoomdar* v. *Mohesh Chander Neoghi* (3) referred to.

THE plaintiffs in this case were the purchasers of a certain garden on the south side of which was a wall, upon which some *pipal* trees grew. The defendants were purchasers of a market which adjoined the plaintiffs' garden to the south. The plaintiffs, alleging that the defendants or their servants had interfered with their possession by picking lac off the pipal trees which grew out of the wall, sued for a declaration that the defendants had no right to the wall or the trees, and for an injunction to restrain them from interfering therewith.

Both the Court of first instance (Munsif of Farrukhabad) and the lower appellate Court (Subordinate Judge of Farrukhabad) found that the wall in question belonged to the plaintiffs' garden and not to the defendants' market, and that the defendants had not been in proprietary possession of the wall and the trees for such a period as to confer on them a right to the said wall and trees by prescription. Both Courts accordingly decreed the plaintiffs' claim.

The defendants appealed to the High Court, and contended that the lower appellate Court had failed to find whether the plaintiffs were in possession within twelve years preceding the date of the suit, and that its finding upon the question of the burden of proof was erroneous. Upon this an issue was remitted by the High Court as to whether or not the plaintiffs had proved their possession within twelve years anterior to the date of the suit. The lower appellate Court found that the plaintiffs had not proved by evidence that they had done any act of possession within twelve years, and hence came to the conclusion that the plaintiffs' possession within twelve years had not been proved. It was, however, contended on behalf of the plaintiffs-respondents that having regard to the natur of the plaintiffs' possession and to the fact that the plaintiffs' title to the property had been found, the mere fact of the absence of proof of any specific act of possession could not in law lead to the conclusion that the plaintiffs were out of possession, but that possession being presumed to be with

(1) (1891-92) I. L. R., 19 Calc., 660. (2) (1892-93) I. L. R., 20 Calc., 560.
(3) (1888) I. L. R., 16 Calc., 473.

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the person having the title, the Court should have held the plaintiffs to be in possession. The view thus presented was accepted by the Judge who heard the appeal, who accordingly dismissed it.

From this judgment dismissing the appeal the defendants-respondents preferred an appeal under section 10 of the Letters Patent.

Mr. *Amir-ud-din*, for the appellants.

Mr. *C. Dillon*, Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* (for whom Babu *Lalit Mohan Banerji*), Munshi *Gulzari Lal* and Munshi *Gokul Prasad*, for the respondents.

KNOX and BLAIR, JJ.—The quarrel out of which the suit is said to have arisen, which led up to the present appeal, is thus stated in the pleadings. The plaintiffs, who are here respondents, say that the defendants began to pick lac off certain *pipal* trees. Upon the plaintiffs' servants interfering, the defendants, here appellants, maintained that the trees belonged to them, and the plaintiffs had no right, title or claim whatsoever in the wall and the trees. The Subordinate Judge went into the whole matter in a very lengthy judgment. Part of the obscurity of the case is perhaps due to the very length of the judgment. His findings, however (he was the Court of first appeal), were to the effect that the wall belonged to the garden, which was admittedly the plaintiffs' property, that the trees were in the garden wall, and that the defendants had not proved any act of adverse possession of any kind. It was unfortunate that the learned Subordinate Judge had not apparently the courage to take the further step and state boldly that upon his finding the wall belonged to the garden and the trees were in the garden wall. The plaintiffs' evidence which had established these facts covered and applied to the whole of the matter now in dispute. He obviously intended this when he went on to consider the question of adverse possession on the part of the defendants.

In second appeal after a remand a finding was undoubtedly put upon the record that the plaintiffs hd not proved that they had done any act of specific possession within the twelve years next preceding the suit, and ground was at once opened for the present appeal. The learned counsel who appeared for the appellants

had every right to insist that upon this finding the plaintiffs' suit must be held to have failed altogether. With considerable energy he pushed forward this finding, and supported it by reference to the ruling of their Lordships of the Privy Council in *Asghar Reza* v. *Mehdi Hossein* (1) and *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (2). The learned Judge of this Court from whose judgment this appeal has been filed took, however, the broader and what we consider proper view of the whole case. He did not content himself by a bare adherence to this finding; but looking at the whole case found it to be one in which, while it might be that specific acts of possession on the part of the plaintiffs could not be directly proved upon a particular portion or appendage of property, still the evidence which applied to the property in the whole of which the part in dispute was merely an appendage, must be held to govern the appendage also. He applied to the case the principle laid down by their Lordships of the Privy Council in *Rajkumar Roy* v. *Gobind Chunder Roy* (3). The property in dispute in that case was a portion of the whole and a portion covered with water. Their Lordships held that "as the plaintiff's evidence is in accordance with, and is aided by, his title and previous possession, which is now made clear, and is not countervailed by anything of the slightest weight on the defendant's part" they were prepared to hold that the evidence, which clearly applied to the whole of the property, must be taken to apply to the land in dispute. So here title and possession of the garden has been clearly found to be with the plaintiffs. It is not countervailed by any act of possession on the defendants' part over the wall and the trees in dispute. We hold that the evidence which applies to the garden must be taken to apply to the walls and the trees in dispute, which we consider to be merely appendages to and part of the garden. The result is that this appeal is dismissed with costs.

Appeal dismissed.

(1) (1892-93) I. L. R., 20 Calc., 560. (2) (1888) I. L. R., 16 Calc., 473.
(3) (1891-92) I. L. R., 19 Calc., 660 at p. 677.

1902
February 27.

REVISIONAL CRIMINAL.

Before Mr. Justice Blair.

EMPEROR *v.* KADHU SINGH AND OTHERS.*

Act No. XLV of 1860 *(Indian Penal Code), section* 147—*Riot—Act No. XLV of* 1860, *sections* 96 *et seqq.*—*Right of private defence.*

Of two parties, each of which claimed title to certain trees, one party went to cut down the trees, and went armed with *lathis*, apparently with the intention of resisting anticipated opposition on the part of the other claimants. The other party attempted to stop the cutting down of the trees, and a fight ensued, in the course of which several people were injured. *Held* that the first party were guilty of rioting, and, whatever their title to the trees was, could not claim that they had acted in the exercise of the right of private defence.

IN this case six persons were convicted by a Magistrate of the first class of the offences of rioting and causing grievous hurt and were sentenced therefore to various terms of imprisonment. The facts on which the convictions were based are thus set forth in the order of the Magistrate :—

"This is the case of a fight which occurred at Usita between two parties of Thakurs, who are engaged in a dispute about certain land in their village. Kadhu Singh went to cut a tree, and had cut up a considerable amount of a *jamun* tree, and begun to cut down a *babul* tree, when Jai Singh came up and told him to stop. Both sides were enraged, and a fight took place in which a large number of injuries were inflicted. Both parties accused one another at the thana afterwards, but subsequently did all they could to hush up the case. I have convicted the other side of rioting and causing grievous hurt.

"The fact that Kadhu Singh, Sardar Singh and Heti Singh went to the place with *lathis*, shows that they were prepared to defend their right to the tree by force, and the whole course of the case shows that both parties knew quite well that the possession of the trees was in dispute. It is therefore clear that these three men, at any rate, were guilty of having the common object of enforcing their supposed right by a show of force, and the fact that they were attacked does not make their position any better, since they obviously provoked the attack. The patwari's evidence cannot be regarded as important, as he attempted to

* Criminal Revision No. 70 of 1902.

make out at first that there was no quarrel at all about these trees, though he afterwards had to admit that both parties laid claim to them, and his statement that the three men mentioned went together to cut the trees is totally at variance with all that has been said by the parties themselves, and is contradicted by the medical evidence, which shows that Kadhu Singh and Jai Singh had far more wounds than anyone else, and these two men must therefore have been fighting before anyone else came up. As regards Karan Singh, Jhamman Singh, and Dhan Singh, it is impossible to accept their explanation that they had no sticks, and only interfered to stop the quarrel. Supposing that a crowd had gone up to stop the quarrel, is it likely that five of them would have received injuries, and one of them would have had five distinct marks more than are to be found on several of the alleged actual combatants?

"Under sections 147 and 325, Indian Penal Code, I sentence Kadhu Singh as the ringleader to rigorous imprisonment for six months, and Dhan Singh, Sardar Singh, Karan Singh, Heti Singh, and Jhamman Singh to rigorous imprisonment for three months."

From this order an appeal was preferred to the Sessions Judge, who dismissed it and affirmed the convictions and sentences. The appellants thereupon applied in revision to the High Court.

Mr. *C. R. Alston*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—I do not see any reason to interfere. It is one of those cases arising out of one of those wretched little village squabbles, which should be disposed of by the Magistrate, but which both parties prefer to dispose of by *lathis*. These present applicants went prepared for a fight. They knew that there were other persons who claimed right and title in these trees. They thought to steal a march on them. They knew very well that there was a probability that they would be met by force. They cut down one tree in dispute, then they proceeded to cut down another. From the point of view of their opponents they were doing an act either of theft or mischief. In doing so they knew

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what they had to expect. They went prepared to fight, and they did fight. They have been punished, and rightly punished too. It is not a case where a man has been in actual exclusive possession of the land, in which case the presumptions of law are all in his favour; there is no such possession in this case. The petition is dismissed.

APPELLATE CIVIL.

1902
March 4.

Before Mr. Justice Banerji and Mr. Justice Aikman.

CHHEDI (JUDGMENT-DEBTOR) *v.* LALU (DECREE-HOLDER).*

Act No. XV of 1877 *(Indian Limitation Act), sch. ii, arts.* 178, 179—*Execution of decree—Limitation—Decree for pre-emption—Time from which limitation begins to run against the decree-holder.*

Article 179 of the second schedule to the Indian Limitation Act, 1877, applies only where there is a decree or order which can at its date be executed. In the case of a decree for pre-emption there is no decree capable of execution until the decree-holder pays into Court the pre-emptive price. The first application, therefore, for execution of such a decree will be governed, not by article 179, but by article 178, and limitation commences to run against the decree-holder from the time when the pre-emptive price is paid. *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (1), referred to.

ONE Lalu obtained a decree for pre-emption against Chhedi. The decree was passed on the 20th of December, 1887, and was conditioned on the decree-holder's paying the pre-emptive price on or before the 20th of February, 1898. The decree-holder deposited the money on the 17th of February, 1898, but made no application for execution until the 16th of February, 1901. On that date the decree-holder applied to the Court which passed the decree alleging that he had in fact got possession of the property to which the decree related, but asking that for the sake of greater security formal possession might also be awarded to him. To this application it was objected by the judgment-debtor that it was barred by limitation. The Court of first instance (Munsif of Ghazipur) held the application to be barred and dismissed it. On appeal by the decree-holder the lower appellate

* First Appeal from Order No. 104 of 1901, from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 25th September, 1901

(1) (1894) I. L. R., 17 All., 39.

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Court (Officiating District Judge of Ghazipur) overruled the Munsif on the question of limitation and remanded the case under section 562 of the Code of Civil Procedure.

From this order of remand the judgment-debtor appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

Maulvi *Muhammad Ishaq*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises out of an application for the execution of a decree for pre-emption passed on the 20th of December, 1897. The decree provides that the purchase money should be paid within two months from its date, and that on such payment the plaintiff should obtain possession of the property. The purchase money was paid on the 17th of February, 1898, and the present application for execution was presented on the 16th of February, 1901. It was thus made after the lapse of three years from the date of the decree, but within three years from the date on which the money was paid. The Court of first instance on the objection of the judgment-debtor held the application to be barred by limitation, applying to it article 179 of schedule ii of the Indian Limitation Act. On the decree-holder's appeal the lower appellate Court set aside the order of the Court of first instance and remanded the case to that Court under section 562, Code of Civil Procedure. From this order of remand the present appeal has been preferred by the judgment-debtor, who renews his contention that the application for execution is barred by limitation.

It is clear that if the first paragraph of article 179 applies, the application is beyond time. But in our opinion, having regard to the nature of the decree which was passed in the case, that article cannot be held to be applicable. It was held in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1) that the first paragraph of the third column of art. 179 must necessarily apply only when there is a decree or order which can at its date be executed. A decree for pre-emption is not capable of execution on the date on which it is passed, unless on that date the plaintiff pre-emptor pays the purchase money which the decree directs to be paid. In this case there was no decree

(1) (1894) I. L. R., 17 All., 89.

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in existence on the 20th of December, 1897, which was capable of execution on that date. It was only when the decree-holder plaintiff paid the purchase money within the time allowed by the decree that he acquired the right to execute the decree by applying to be put in possession of the property in suit. The decree was drawn up in the usual form under section 214 of the Code of Civil Procedure, and one of the provisions of it was that on failure of the plaintiff to pay the purchase money within the time fixed the suit was to stand dismissed with costs, so that the decree was subject to a condition, the performance or non-performance of which made it one which could be enforced at the instance of the plaintiff or the defendant as the case might be. Such being the case, we are of opinion that the article properly applicable to the first application for the execution of such a decree is article 178, and that the three years provided in that article should be calculated from the date on which the right to apply accrued. Subsequent applications for the execution of the decree will of course be governed by article 179. We think the learned Judge was right, and we dismiss the appeal with costs.

Appeal dismissed.

1902
March 11.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

SAKINA (APPLICANT) *v.* GAURI SAHAI (OPPOSITE PARTY).*

Civil Procedure Code, sections 80, 108—*Application to set aside a decree passed* ex parte—*Irregular service of summons.*

Where a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service.

IN this case Gauri Sahai having obtained a decree *ex parte* against Musammat Sakina, the latter applied, under section 108 of the Code of Civil Procedure, to have the *ex parte* decree set aside and the case re-heard. The principal grounds of the judgment-debtor's application were that she had not been served with notice of the suit, and had in fact only come to know of the existence of the decree about two weeks or more after it was

* First Appeal from Order No. 94 of 1901, from an order of Maulvi Muhammad Shafi, Officiating Subordinate Judge of Moradabad, dated the 13th May 1901.

passed, and that although her husband's brother Ashfaq Husain had been a party to the suit and had appeared and defended, Ashfaq Husain was in reality hostile to her and had neither informed her about the suit nor protected her interests therein.

The Court of first instance dismissed the application. The material part of its finding was as follows:—

"The record shows that the 9th April, 1900, was the date fixed for final hearing. There were several defendants, among whom was one Ashfaq Husain who was own brother to Musammat Sakina's husba nd, and he contested the claim fully. Musammat Sakina's summons was affixed to the door with the allegation that she had gone to Seana on the 12th March, 1900, that is, about one month before the date fixed for hearing which was the 9th April, 1900. Ashfaq Husain fully contested the claim, and the suit was decided on the 25th August, 1900. On the 19th September the present application for setting aside the decree was presented on behalf of Musammat Sakina. I consider it extremely improbable that during the whole period of more than five months that the suit was litigated she had no notice of it. A few of her relations have been called to show that Musammat Sakina had remained in Seana for six or seven months; but being her relations they are partial. These witnesses vaguely stated that Ashfaq Husain was on hostile terms with Musammat Sakina; but no particular ground of hostility has been shown. I believe that it is really Ashfaq Husain who wants to get the case reopened, or at least to cause a delay in execution."

From this order the applicant appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Mr. *Abdul Majid*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal from an order of the Subordinate Judge of Moradabad refusing an application made by the defendant, the present appellant, to have an *ex parte* decree obtained against her set aside under the provisions of section 108 of the Code of Civil Procedure, on the ground that she was not duly served with the summons. It appears from the evidence of the process-server that he attended at the house of the defendant, and learnt on inquiry that she was not present in the house, but had gone to Seana, in the district of Bulandshahr. Without further attempt to serve the summons on the defendant personally, he affixed the summons to the outer door of the house in which she had resided. This was clearly not proper service within the provisions of the Code of Civil Procedure. Where the serving officer finds a defendant to be away temporarily from home and knows where he is, it is not good

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service if he thereupon does no more than fix the summons to the outer door. He must make further efforts to effect personal service. The Subordinate Judge ought in our opinion, under the circumstances, to have set aside the *ex parte* decree, and allowed the defendant an opportunity of defending the suit. We accordingly must set aside his order, and direct that the decree passed *ex parte* be set aside, so far as the appellant is concerned, and the case re-heard upon the merits as against her. The appellant is entitled to her costs.

Appeal decreed.

1902
March 11.

REVISIONAL CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

AMIR BEGAM AND OTHERS (DEFENDANTS) *v.* PRAHLAD DAS (PLAINTIFF).*

Civil Procedure Code, section 25—Transfer—Retransfer by District Judge to his own file of a case once transferred by him to the file of the Subordinate Judge.

Where a District Judge has once exercised the powers conferred by section 25 of the Code of Civil Procedure, and transferred a case to his own files from the files of the Subordinate Judge, he cannot afterwards re-transfer such case to the Subordinate Judge. *Sukharam* v. *Gangaram* (1) followed. *Sita Ram* v. *Nauni Dulaiya* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *R. K. Sorabji*, for the applicants.

Pandit *Moti Lal Nehru*, for the opposite party.

STANLEY, C.J. and BURKITT, J.—This is an application under section 622 of the Code of Civil Procedure praying that an order of the District Judge of Allahabad transferring a suit from his file to the Court of the Subordinate Judge may be set aside, on the ground that the learned Judge had no power to retransfer the suit from his Court to the Court of the Subordinate Judge.

The suit was brought in the Court of the Subordinate Judge, and upon an application made by both parties to the District Judge, it was transferred by him to his own file. Several applications appear to have been made in the suit, one of which, namely, an

* Civil Revision No. 2 of 1902.

(1) (1899) I. L. R., 13 Bom., 654. (2) (1889) I. L. R., 21 All., 230.

application for amendment of the plaint, had been disposed of by the Subordinate Judge. On the 16th of November the District Judge *suo motu* retransferred the case to the files of the Subordinate Judge for trial.

It is now contended on the part of the appellants that this order of retransfer was made *ultra vires*, there being no power under section 25 of the Code of Civil Procedure, once a case has been transferred from a subordinate to a superior Court, to retransfer it back to the same subordinate Court. The language of the section appears to us to be explicit and clear. Under it the High Court or District Court is empowered to withdraw any suit, whether pending in the Court of first instance or in the Court of appeal, subject to the High Court or District Court, as the case may be, and try the case itself or else transfer it for trial to any other such subordinate Court competent to try the same in respect of its nature, and the amount or value of the subject-matter. Now it appears to us that once the District Court withdrew the suit and transferred it to its own files for trial, it had exhausted all its powers under the section, and was not competent under the section to retransfer it again to the subordinate Court. It was open to the District Court to transfer the case for trial to any other subordinate Court competent to try it at the time of the withdrawal of the suit; but this the District Court did not do in the present case, but placed the case upon its own files for trial. We find that a question very similar to this came up before a Bench of this High Court of which one of us was a member, namely, the case of *Sita Ram* v. *Nauni Dulaiya* (1). In that case the District Judge had under the provisions of section 25 of the Code of Civil Procedure transferred a suit from the Court of the Subordinate Judge to his own Court for trial. The District Judge decided the suit, and from his decree there was an appeal to the High Court. Upon the appeal the High Court remanded the suit under section 562 of the Code to the Court of the District Judge. Thereupon the District Judge transferred the case to the Subordinate Judge for trial. It was held that the District Judge had no power so to transfer the suit, but was bound

(1) (1899) I. L. R., 21 All., 230.

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AMIR BEGAM v. PRAHLAD DAS.

to try it himself. The facts are not altogether on all fours with the case before us, but the true principle which, in our opinion, governs the case was laid down by the learned Judges in the judgment in that case (at p. 231 of the Report) in the following terms:—"His (*i.e.* the District Judge's) power of transfer under section 25 had been exhausted when the suit was originally withdrawn from the Court of the Subordinate Judge, so even if section 25 were applicable to a case remanded under section 562 (we think it is not applicable,) that section does not empower the District Judge to retransfer the case to the subordinate Court from which it had been withdrawn." This decision by anticipation seems to govern the present case. We find, however, that the question has been expressly decided in a case in the Bombay High Court, in which the facts were on all fours with those of the present case, namely, in the case of *Sukharam* v. *Gangaram* (1), in which case it was held that when a District Judge made an order to retransfer a case to the original subordinate Court, "the order of retransfer was *ultra vires*, and should be discharged." We think, therefore, that upon the language of the section of the Act, and upon the authorities cited above, the order of retransfer in this case was clearly wrong. We therefore must allow this application, and cancel the order of the District Judge, and direct him to retain the case upon his own files for trial. Seeing that the order of retransfer was made by the learned Judge of his own motion, we make no order as to costs.

Application allowed.

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March 11.

APPELLATE CRIMINAL.

Before Mr. Justice Knox.

EMPEROR *v.* BIRCH.*

Criminal Procedure Code, section 562—First offender—Powers conferred by section 562 exerciseable by a Court of appeal—Criminal Procedure Code, section 523(d).

Held that the powers conferred by section 562 of the Code of Criminal Procedure upon a Court by which a first offender is convicted, are by virtue of section 423*(d)* of the Code, exerciseable by the High Court sitting as a Court of appeal.

* Criminal Appeal No. 109 of 1902.

(1) (1889) I. L. R., Bom., 654.

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IN this case the appellant was convicted of an offence under section 471 of the Indian Penal Code and sentenced to three months' rigorous imprisonment. The facts found against him were, that he, having applied for the post of Secretary to the Municipal Board of Jhansi, supported his application by the production of what purported to be a copy of a certificate granted to the appellant by "S. W. Harding, Commissioner," the said copy being a forgery. Against this conviction and sentence the appellant appealed to the High Court.

Mr. *R. K. Sorabji*, for the appellant.

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown.

KNOX, J.—The accused has been convicted of an offence under section 471 of the Indian Penal Code. He has been sentenced to three months' rigorous imprisonment. Of the serious nature of the offence there can be no doubt.

The learned Magistrate who convicted the accused said not one word too strong in his judgment about the nature of the offence. He adds, however, that in consideration of the youth of the accused (for he is only twenty years of age), and that he is apparently of a respectable family, and from his appearance seems rather weak than deliberately criminal, he proceeds to pass a sentence which would have been a light sentence for an offence under the section under which the accused was convicted.

Taking all the learned Magistrate had said into consideration, it appeared to me that this was a case to which the provisions of section 562 of the Code of Criminal Procedure were intended to apply. It was necessary, however, to be satisfied that matters, which had not been proved before the Magistrate, should either be proved or admitted in this Court, *i.e.* that the accused was one against whom no previous conviction could be proved, and that his character and antecedents were of such a nature as to authorize a Court to avail itself of this section. Time was accordingly given to both sides. The learned Government Pleader represented that he was satisfied that the evidence forthcoming as to character and antecedents of the offender would be quite sufficient, and he therefore did not propose challenging this point. He, however, contended that section 562 was a section of which

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this Court could not avail itself when sitting as a Court of appeal; also that the offence was an offence punishable with imprisonment for more than two years. Lastly, he contended that the offence was not a trivial one. Dealing with the second objection first, he maintained that the offence of which the appellant was convicted was in reality an offence falling within the provisions of section 466 of the Indian Penal Code. There is no doubt that the act of the accused is one which was far-reaching, and might have involved him in very serious results. I have, however, to deal with the following circumstances:—(1) that he stands before me convicted of an offence under section 465 read with section 471; (2) that there has been no application before me to enhance the sentence, and that, on the other hand, the only argument before me has been that if the learned counsel for the appellant had pressed for the reduction of sentence, the learned Government Pleader had been instructed not to oppose such application.

I take the offence as it stands, an offence punishable with not more than two years' imprisonment. Regarding the third objection, it has already been dealt with to a very great extent in what I have just said. It is very fortunate for the accused that what was done was so quickly discovered, and the matter did not reach further. There remains the first objection, which is not so easy to decide. Taking into consideration all that has been argued before me, I am still of opinion that the new provisions inserted in section 423, clause *(d)* are sufficiently ample to enable me to deal with the case and to apply the provisions of section 562. In a case before the Bombay High Court (that case is to be found in the Bombay Law Reporter, Vol. II, p. 817*), the learned Judges read the section in the way I propose to read it, *i.e.* that where no previous conviction is proved against an offender, and the offence is one under the Indian Penal Code punishable with not more than two years' imprisonment, regard

[* *Queen-Empress* v. *Tukaram Chima*. But in this case the sole question before the High Court was whether the powers conferred by section 562 could be exercised by the convicting Court in the case of a person of the age of 40 years, *i.e.* whether under that section the first offender with a past good character and antecedents must necessarily be also a "youth". The question whether the High Court as a Court of appeal could use the section was not in issue.—ED.]

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may be had to the youth, character, and antecedents of the offender, and the section applied on those grounds.

I accordingly, maintaining the conviction, alter the nature of the sentence, and make an order under section 562 of the Code of Criminal Procedure.

I direct that accused enter into a personal bond of Rs. 100 with two sureties of Rs. 100 each, and that upon his doing so he be released, and for a period of one year undertake to appear and receive sentence when called for, and in the meantime to keep the peace and be of good behaviour. I give him one week within which to carry out this order. Upon the order being carried out, the bail under which he at present stands will be discharged.

REVISIONAL CRIMINAL.

1902
March 17.

Before Mr. Justice Blair.

EMPEROR *v.* WAZIR AHMAD.*

Act (Local) No. 1 *of* 1900 *(Municipalities Act), section* 147—*Bye-laws of Municipality—Continuing breach—Recurring fine—Imposition of fine in advance.*

Held that where, as in section 147 of Act No. 1 of 1900 (Local), it is directed that a breach of some law may be punished with a fine of a certain sum per diem so long as the breach continues, it is not competent to the Court to impose such fine in advance whilst sentencing an offender in respect of the original breach; but there must be proof of the continuing breach having been committed. *Ram Krishna Biswas* v. *Mohendra Nath Mozumdar* (1) followed.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Agra. The facts out of which the reference arose are fully stated in the order of the Sessions Judge, which was as follows:—

"The applicant in this case applied to the Municipality for permission to construct a house. With his application, dated June 25th, 1901, he put in a plan which showed that he proposed to leave a space of 1½ feet between the wall of his house and the kachcha drain which separated it from the public road. Building according to the plan was permitted, except that permission was

* Criminal Reference No. 142 of 1902.

(1) (1900) I. L. R., 27 Calc., 565.

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EMPEROR v. WAZIR AHMAD.

refused for the construction of two flights of steps at the sides of the house bridging the drain.

"As the applicant did not himself propose to bring the wall right up to the edge of the drain, there was, of course, no need for any express written order that he should leave a space, and no such order was consequently passed. However, in contravention of his own plan he carried his front wall forward right up to the edge of the drain. For this he was prosecuted under section 147 for omitting to comply with the conditions, subject to which permission was given him by the Board under the power conferred on it by chapter 7 of the Municipal Act, and fined Rs. 25 with a fine of Rs. 2 per day, for every day during which, after 35 days from the date of the conviction, the building remained unaltered, and not in accordance with the plan.

"For the applicant it is contended that he did not omit to comply with any written directions which the Board could lawfully pass, that he ought to have been served with a notice to alter the building under section 87(5), against which he might have appealed to the Commissioner and got him to stay prosecution with reference to section 152 of the Act, and that the order for a recurring fine was illegal at that stage of the case.

"With regard to these contentions, I think it is correct that the applicant did not omit to comply with any express written condition or direction as to the strip between the wall and the drain. But when a person is given permission to build according to a plan which he has himself put in, it is clear that it must be understood that a condition of the permission is that the building should be according to the plan. It is absurd to suppose that a man may get a building sanctioned according to a plan and then build anything he likes. Section 87(5) provides that the bond may require the building to be altered or demolished. But this is permissive, not mandatory, and I find nothing in the law which requires that such a notice shall be issued before a person can be prosecuted under section 147. It is possible that a Municipal Board may think it sufficient to get a man punished for his contempt of public authority, and not think it worth while to put him to the trouble and expense of making considerable alterations. To take the present case, it is probably a

matter of little consequence to the Board whether the applicant's wall comes up to the drain or not. But, as a matter of principle, and to prevent all sorts of tricks and encroachments, the Board is entitled to expect that people should adhere to their plans. I think, therefore, that the applicant, having been permitted to build according to a plan, has been very properly fined for building in contravention of that condition.

"With regard to the recurring fine, section 147 provides that in the case of a continuing breach a further fine may be imposed for every day, after the date of the first conviction, during which the offender is proved to have persisted in the disobedience or omission. In the similar case of *Ram Krishna Biswas* v. *Mohendra Nath Mozamdar* (1), it has been held that the order for the payment of the daily fine was illegal, inasmuch as it was an adjudication in respect of an offence which had not been committed when the order was passed. From this it would appear that the Municipal Board, if they want to have the applicant subjected to a daily fine for persisting in his omission to comply with the condition of the permission, will have to wait for a reasonable time, and then institute a fresh prosecution with this object.

"I accordingly submit the record to the Hon'ble High Court, with a recommendation that the order for a recurring fine should be set aside."

Upon this reference being laid before the Court, the following order was passed :—

BLAIR, J.—The order for payment of so much fine per day so long as the building continues to stand is illegal. The addition of such an order is premature. There must be proof of a continuing offence before the jurisdiction of a Magistrate to make such an order arises. That portion, therefore, of the order will be set aside. I am supported in this view by the decision of the Calcutta High Court in *Ram Krishna Biswas* v. *Mohendra Nath Mozamdar* (1).

(1) (1900) I. L. R., 27 Calc., 565.

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March 18.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

JAMNA KUNWAR (PLAINTIFF) *v.* NASIB ALI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 510, 514—*Arbitration—Delegation of their duties by the arbitrators—Award not submitted by the arbitrators within the time limited by the Court.*

The parties to a suit for winding up a partnership agreed to refer the suit to arbitration, and two arbitrators were appointed by the Court. The parties subsequently agreed that the matters in dispute should be settled by one Saif Ali, who was within a certain time to send in his opinion to the arbitrators in order that they might submit to the Court an award in accordance therewith. Saif Ali sent in his opinion to the arbitrators some days before the time fixed by the Court for the submission of the award; but the arbitrators did not submit their award within time. *Held* that the agreement of the parties to let the matters in dispute be settled actually by Saif Ali could not possibly have the effect of superseding the appointment of arbitrators by the Court. Before the Court could proceed to hear the suit it was necessary that it should itself make, under either section 510 or section 514, an order superseding the reference to arbitration.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath* (for whom Munshi *Gulzari Lal*), for the appellant.

Pandit *Moti Lal Nehru*, for the respondents.

STANLEY, C.J. and BURKITT, J.—The decree of the learned Subordinate Judge in this case cannot be upheld. The suit was instituted by the plaintiff for dissolution of partnership and taking of the partnership accounts. Thereupon an agreement was entered into between the parties to refer the matters in dispute to arbitration, and an order was made by the Court under the provisions of the Code of Civil Procedure, referring the suit to arbitration on the 27th of June, 1898. The arbitrators appointed were one Debi Prasad and one Maulvi Ahsan-ullah, who were respective pleaders for the parties in the suit. A number of proceedings were recorded by these arbitrators, and amongst others a proceeding of the 7th of August, 1898, in which it was stated that "the parties would accept and admit the decision of

* First Appeal No. 65 of 1899, from a decree of Rai Kishan Lal, B.A., Subordinate Judge of Cawnpore, dated the 18th January 1899.

the case as made jointly by Pandit Mangli Prasad, the plaintiff and Shaikh Nasib Ali, the defendant." Nothing appears to have been done by these parties so named; but on the 8th of August a further proceeding is recorded by the arbitrators, in which it is stated that "all the parties have agreed to accept what would be decided in this case by Sheikh Saif Ali." Upon this the arbitrators allowed time up to the 18th of August 1898 to Sheikh Saif Ali to deliver his decision in writing to them within the said period. Sheikh Saif Ali delivered his decision to the arbitrators on the 20th of August. It appears that the arbitrators, Debi Prasad and Ahsan-ullah, had applied to the Court on several occasions and got extensions of time for filing their award up to the 29th of August, 1898. The time was extended by three orders, dated the 28th of July, the 19th of August and 26th of August. We further find that these arbitrators on the 23rd of August directed that the case should be brought forward for final disposal before them on the 24th of August, giving as their reason that the time for filing in Court their award was approaching very near. This was three days before the date to which time for filing their award had been extended by the Court. It is perfectly clear from this that the arbitrators who had been appointed by the Court did not consider that they had been superseded as arbitrators; on the contrary, what we gather from the record of proceedings which they kept is that they considered themselves to be the arbitrators whose duty it was to determine the matters in dispute, but that they had delegated, by consent no doubt of the parties, to Sheikh Saif Ali the determination of these matters. The time for filing an award by the arbitrators expired without an award being filed, although Saif Ali had sent in his decision in writing to the arbitrators on the 20th of August, 1898.

Upon these facts the learned Subordinate Judge held that the parties by the so-called agreement of the 8th of August, 1898, referred the matters in dispute to the arbitration of Sheikh Saif Ali without the intervention of the Court, and that this agreement had the effect of taking away the jurisdiction of the arbitrators who had been appointed by the Court, and that this agreement was a bar to the suit of plaintiff under section 21 of

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the Specific Relief Act. We are wholly unable to see how this alleged consent could have any such effect. The arbitrators had been appointed by the Court under the provisions of the Code of Civil Procedure. It was therefore not open to them to delegate their authority to a third party, nor was it within the power of the parties to render nugatory the order of the Court appointing arbitrators or withdraw the suit from the cognizance of the Court unless under an order of the Court itself. Section 510 provides that if the arbitrators fail for any of the reasons therein mentioned to act, the Court may either appoint new arbitrators or else make an order superseding the arbitration. Now the arbitrators in the present case neglected to file their award, and therefore, as it seems to us, it was the duty of the Court before any other steps were taken to supersede the arbitration under the provisions of this section. It is argued that the Court did supersede the arbitration, but we do not think that this was the case. An application was made to the Court for an order calling upon the arbitrators to file in Court all the papers relating to the arbitration proceedings, and upon this application the Court, on the 5th of September, 1898, directed that the papers be called back, and the case be put up for hearing the argument. This did not amount to a supersession of the arbitration. Under these circumstances we hold that the view taken by the learned Subordinate Judge was entirely mistaken, and that the reference to arbitration is still in force, and that before the suit can be entertained or heard, there must be an order for supersession under section 510 or section 514. Accordingly we must set aside the decree and remand the suit with instructions to the learned Subordinate Judge that he should, if he thinks fit, supersede the arbitration and proceed with the suit. The costs of this appeal will abide the event.

Appeal decreed and cause remanded.

REVISIONAL CRIMINAL.

1902
March 18.

Before Sir John Stanley, Knight, Chief Justice.

IN THE MATTER OF THE PETITION OF NATHU MAL.*

Statute 24 and 25 Vic., cap. civ., section 15—Criminal Procedure Code, sections 145, 435, 439—Order of Magistrate in case of a dispute relating to immovable property—High Court's powers of revision.

Held that the High Court cannot exercise revisional powers in respect of proceedings under Chapter XII of the Code of Criminal Procedure unless in a case where the Magistrate has acted without jurisdiction. *Doulat Koer* v. *Rameswari Koeri* (1) followed.

THIS case arose out of a dispute as to the right to collect dues in a certain bazar. The facts were briefly as follows. On the 3rd of December 1901 one Bodhai Ram and others presented a petition to a Magistrate of the Allahabad District, complaining that one Nathu Mal through his agent and servants had on the 2nd December 1901 taken forcible possession by collecting bazar dues of a certain bazar called bazar Jasra, which, the complainants alleged, had up to that date been in their possession. This application was referred to the Tahsildar for inquiry and report. On the 9th of December Bodhai Ram and others applied to the Magistrate under section 144 of the Code of Criminal Procedure, for an order restoring them to possession, which was granted. On the 10th of December an application presented on behalf of Nathu Mal was dismissed. Subsequently on the 17th December the Magistrate, in consequence of the report submitted by the Tahsildar, commenced proceedings under section 145 of the Code of Criminal Procedure. Both sides filed written statements, and a large number of witnesses were summoned by both sides, one party applying for the summoning of 57 witnesses and the other for the summoning of 50 witnesses. These numbers were afterwards reduced to 21 and 12 respectively. Before, however, the witnesses named in the amended lists filed by the parties had been summoned, the Magistrate had examined the most important of the witnesses, and having arrived at the conclusion that Nathu Mal had forcibly dispossessed Bodhai Ram and that he was supporting a false claim by means of perjured witnesses and forged

* Criminal Revision No. 111 of 1902.

(1) (1899) I. L. R., 26 Calc., 625.

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IN THE MATTER OF THE PETITION OF NATHU MAL.

documentary evidence, made an order under section 145(4) of the Code in favour of Bodhai Ram. Against this order an application in revision was presented to the High Court, the principal ground of which was that none of the witnesses named in the second list of 21 witnesses put in by Nathu Mal had been examined by the Magistrate. This application was made not under the Code of Criminal Procedure, but under section 15 of the Charter Act.

Babu *Sital Prasad Ghosh*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), in support of the order of the Magistrate.

STANLEY, C.J.—A rule in this case was issued, calling upon the Magistrate to show cause why his order of the 21st of January, 1902, passed under section 145 of the Code of Criminal Procedure, should not be set aside, on the ground that the same was passed without hearing the evidence of any of the witnesses who were produced on behalf of the second party, Lala Nathu Mal, and such other order passed as the Court might think fit. The rule was issued by me under a misapprehension as to the facts. I understood from a statement of the learned vakil who made the application that none of the witnesses who were called on behalf of the second party had been examined. It, however, now transpires that no less than ten witnesses were examined on his behalf. It appears that in addition to these ten witnesses summonses had been issued for the attendance of 21 other witnesses, and that none of these last-mentioned witnesses were examined by the Magistrate, inasmuch as he believed that the evidence which was being produced by the second party was worthless, and that it was only a waste of public time to examine further witnesses. In his explanation the Magistrate has stated to this effect, and shown that the order which he passed was not made until he had examined a great number of witnesses, and had satisfied himself as to the propriety of the order. Under these circumstances it is clear that the Magistrate did not act without jurisdiction. He considered the case and heard as many as ten witnesses on behalf of the second party and five on behalf of the first party. The present application in revision is made under the provisions of section 15 of the Charter Act. Under the

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Code of 1898 the revisional powers of the Court in proceedings under Chapter XII were withdrawn, and therefore, as it seems to me, the Court is not empowered to exercise revisional jurisdiction in such proceedings unless in cases where the Magistrate has acted without jurisdiction. According to the present state of the law, since the passing of the Act of 1898, the power of revision to be exercised by the Court is limited to matters of jurisdiction, that is, to cases in which it is found that the Magistrate taking proceedings under Chapter XII has acted without jurisdiction. If an order purporting to be made under section 145 is made without jurisdiction, there is no doubt this Court can exercise its powers under section 15 of the Charter Act; but that is not the present case. Here the Magistrate acted within his powers, and if anything has been done by him to which objection can be taken, it was at the most an irregularity, and this Court is precluded from interfering by the express provisions of the Act of 1898. I find that this was so laid down in a case decided by a Bench of the High Court of Calcutta, consisting of Mr. Justice Prinsep and Mr. Justice Wilkins. That is the case of *Doulat Koer* v. *Rameswari Koeri* (1). It appears to me that the law is there correctly laid down, and that the High Court cannot exercise revisional powers in proceedings under Chapter XII unless in a case where the Magistrate has acted without jurisdiction. For these reasons the rule must be discharged. I accordingly discharge it.

APPELLATE CIVIL.

1902
March 20.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DUDHNATH KANDU (DEFENDANT) *v.* MATHURA PRASAD (PLAINTIFF).*

Suit for damages for malicious prosecution—Plaintiff not prosecuted by defendant, though named by him as having some connection with an assault made upon him—Prosecution initiated by Magistrate suo motu.

One Dudhnath Kandu lodged a complaint before a Magistrate that he had been assaulted and severely beaten by four persons whom he named. He

* First Appeal No. 123 of 1899, from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 16th June 1899.

(1) (1899) I. L. R., 26 Calc., 625.

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subsequently added the name of a fifth person as one of his assailants. When required to make a statement upon oath in support of his complaint, he stated *inter alia*, that in the course of the assault one Mathura Prasad came from behind and called out "beat." Thereupon the Magistrate issued a warrant against Mathura Prasad also as well as against the persons named in the complaint. Mathura Prasad was acquitted, and thereafter brought a suit for damages for malicious prosecution against the complainant. *Held* that the plaintiff had never been prosecuted by the complainant, but that his prosecution was due to the action of the Court *suo motu*, and that the plaintiff had no cause of action against the defendant complainant.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri* and Babu *Jivan Chandra Mukerji*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Azamgarh, by which he allowed damages to the extent of Rs. 2,576 to the plaintiff for alleged malicious prosecution. It appears from the evidence in the case that on the 12th of September, 1898, the defendant was severely beaten by several persons and had an arm fractured. He made a report at the police station that four persons whom he named had assaulted him. Subsequently he presented a petition of complaint to the Criminal Court, in which to the four persons whom he had charged with the assault upon him, he added the name of a fifth, namely, one Jugal Kishore. In the ordinary course the defendant was required to make a statement upon oath of the occurrence previous to the issue of process; and in the course of his examination, in detailing the circumstances of the assault, he said that Mathura Prasad, the plaintiff, in the course of the assault, came from behind and called out "beat." Thereupon the Magistrate issued a warrant against the plaintiff in addition to the other persons to whom we have referred.

It is clear from this that no complaint whatever was made by the defendant against Mathura Prasad, but that in the course of his examination upon oath as a witness the defendant did connect the plaintiff with the assault in the way which we have mentioned. The defendant seems to us to have carefully abstained from lodging a complaint against the plaintiff. An

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action for malicious prosecution does not lie under such circumstances. There has been no prosecution by the defendant of the plaintiff. The prosecution which was directed, was directed by the Magistrate *suo motu*, and not upon a complaint of the defendant, or in any application made by him for the issue of process. The words complained of were spoken by the defendant upon a privileged occasion, namely, when he was being examined before a Magistrate in the course of a criminal proceeding. It appears to us, therefore, that the action was wholly misconceived, and that the facts appearing in evidence did not justify its institution. It is unnecessary for us, holding as we do this view, to go into the other matters which have been discussed in the judgment of the Subordinate Judge; but we may say that if there was a prosecution of the plaintiff by the defendant as alleged, the reasons which the Judge has assigned in his judgment for his refusal to admit the plea of the defendant that there was reasonable and probable cause for the prosecution are wholly unintelligible. We allow the appeal, set aside the decree, and direct the plaintiff's suit to stand dismissed with costs.

Appeal decreed.

FULL BENCH.

1902
June 20

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Knox, Mr. Justice Blair, Mr. Justice Banerji and Mr. Justice Aikman.

DEO NARAIN RAI AND ANOTHER (PLAINTIFFS) *v.* KUKUR BIND AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 59 *and* 123—*Mortgage—Signature of mortgagor—Mortgagor's name signed by the scribe of the document at the request and in the presence of an illiterate mortgagor—Signature held to be good—Maxim—Qui facit per alium facit per se—Construction of statutes.*

It is not imperatively required by section 59 of the Transfer of Property Act, 1882, that a mortgage, where the principal money secured is Rs. 100 or upwards, shall be signed by the mortgagor with his own hand, or by an agent specially appointed in that behalf. If the mortgagor is illiterate, it is

* Second Appeal No. 404 of 1900 from a decree of Maulvi Syed Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 10th of February, 1900, confirming a decree of Munshi Achal Behari Lal, Munsif of Ghazipur, dated the 12th of December, 1899.

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a good signature if, in the presence and at the request of the mortgagor, some other person signs the mortgagor's name on his behalf as executant of the document.

So held by Stanley, C.J. and Knox, Blair and Banerji, JJ., (Aikman, J., *dissentiente*) overruling the decision in *Moti Begam* v. *Zorawar Singh* (1).

Per AIKMAN, J.—Whether or not the autograph signature of the executant is required to any particular document is usually a question of construction to be decided separately in each case. In the case of a mortgage executed in accordance with the provisions of section 59 of the Transfer of Property Act, 1882, the law requires the personal signature of the mortgagor.

In the course of the judgments the following authorities were referred to—*Hyde* v. *Johnson* (2), *Spencer* v. *Metropolitan Board of Works* (3), *The Queen* v. *The Justices of Kent* (4), *In re Whitley Partners, Ld.* (5), *Luchmee Buxsh Roy* v. *Runjeet Ram Panday* (6), *Budoobhoosun Bose* v. *Enaet Moonshee* (7), *Ex parte Wallace* (8), *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (9) and *Crawford* v. *Spooner* (10).

THIS was a suit for possession under the terms of a mortgage-deed executed by one Kukur Bind *alias* Umar Bind. Kukur Bind, the mortgagor, being illiterate, his signature was affixed for him to the mortgage deed by the scribe thereof, one Shiunandan Lal, a patwari. What was actually written was this:—"Signed by Kukur Bind *alias* Umar Bind, by the pen of Shiunandan Lal, Patwari." The deed was duly registered, and Kukur Bind admitted execution of the deed. His signature below the registration endorsement appears as:—"Signature of Kukur Bind by the pen of Shiunandan Lal." Kukur Bind was identified before the registering officer by the patwari who had signed for him. When, however, the present suit was brought, Kukur Bind, among other defences, pleaded that the document sued on was not a valid mortgage deed, because it had not been executed and completed according to section 59 of the Transfer of Property Act (No. IV of 1882). This contention was accepted by the Court of first instance (Munsif of Ghazipur), which, following the ruling of the High Court in *Moti Begam* v. *Zorawar Singh* (11) dismissed the suit. An appeal to the District Judge having been dismissed on the same grounds, the plaintiff appealed to the High Court.

(1) Weekly Notes, 1899, p. 196.
(2) (1836) 2 Bing. N. C., 776.
(3) (1882) L. R., 22 Ch. D., 142.
(4) (1873) L. R., 8 Q. B., 305.
(5) (1886) L. R., 32 Ch. D., 337.
(6) (1873) 20 W. R. C. R., 375.
(7) (1867) 8 W. R., 1.
(8) (1884) 14 Q. B. D., 22.
(9) (1891) L. R., 1891 A. C., 531.
(10) (1846) 6 Moo. P. C., 1.
(11) Weekly Notes, 1899, p. 196.

Pandit *Sundar Lal*, for the appellants.

The only question in this case is whether the mortgage deed has been signed by the mortgagor within the meaning of section 59 of the Transfer of Property Act, 1882. In the General Clauses Act of 1868 no definition is given of "signature." In the Indian Registration Act, 1877, "signature" includes the affixing of a mark. Similarly, neither in the General Clauses Act of 1887 nor in that of 1897 is there any exhaustive definition of "signature". These Acts merely say what "signature" shall include, but contain no precise definition of the term. The practice in India is that where the executant of a document is illiterate he simply touches the pen wherewith some one else signs his name for him *(cf.* Gour's Transfer of Property Act, p. 266). Stroud's Judicial Dictionary, article "Signature," page 736, and Darby and Bosanquet, Law of Limitation, page 382 were also referred to.

I rely upon the general maxim "*Qui facit per alium facit per se*," and I submit that the case of *Moti Begam* v. *Zorawar Singh*, (1) has not been correctly decided. Shiunandan Lal, patwari, was the agent of Kukur Bind for the purpose of making his signature. Such agency may be created orally, or even by implication and ratification—Bowstead on Agency, pp. 38 and 43. There is nothing in the language of section 59 of the Transfer of Property Act to take it out of the operation of the general principle alluded to above. At the hearing of *Moti Begam* v. *Zorawar Singh* reliance was placed upon section 123 of the Transfer of Property Act, which relates to gifts and provides that a deed of gift of immovable property must be signed "by or on behalf of the donor." As to this I say first, that gifts and mortgages are not *in pari materiâ*; and, secondly, that the Chapter on mortgage in the Transfer of Property Act must be construed as a part of the Contract Act *(vide* section 4 of Act IV of 1882). I rely upon *The Queen* v. *The Justice of Kent* (2) and *In re Whitley Partners, Ld.* (3), especially the latter case. *Hyde* v. *Johnson* (4), upon which the judgment in Moti Begam's case was largely based, was a case decided upon a special enactment and affords no safe ground for the decision of

(1) Weekly Notes, 1899, p. 196.
(2) (1873) L. R., 8 Q. B., 305.
(3) (1886) L. R., 32 Ch. D., 337.
(4) (1836) 2 Bing., N. C., 776.

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the present case. That case was referred to and explained by Bowen, J., in *In re Whitley Partners Ld.* (1). The view I now contend for was taken by a Bench of this Court in S. A. No. 48 of 1895, decided by Knox and Burkitt on 30th April 1897.

Mr. *Abdul Raoof*, for the respondents.

I do not deny the truth of the general principle *qui facit per alium facit per se*, but I rely on the clear language of section 59 of the Transfer of Property Act. I would specially point out the difference in the wording of the two sections 59 and 123. Where such a difference of language exists in the same Act, it is to be presumed that the difference is intentional, and the inference is that in the case of a mortgage the Legislature meant to make the personal signature of the mortgagor necessary, or at any rate signature by a specially authorized agent. I would refer to *The King* v. *The Inhabitants of Great Lolton* (2). There are also certain cases decided on former Limitation Acts, which throw some light upon the construction which, I submit, is to be placed on section 59 of the Transfer of Property Act. These are *Budoobhoosun* v. *Enaet Moonshee* (3) and *Luchmee Buxsh Roy* v. *Runjeet Ram Pandey* (4).

Pandit *Sundar Lal* in reply.

On the 20th of June 1902 the judgment of the Full Bench were delivered.

STANLEY, C.J. — The question raised in this appeal is a narrow one, but it is none the less very important. It is whether or not, having regard to the provisions of section 59 of the Transfer of Property Act, 1882, a mortgage to be effective must bear either the autograph signature of the mortgagor or his mark. The facts of the case are simple and undisputed. On the 25th of August, 1896, one Kukur Bind borrowed a sum of Rs. 381 from the plaintiffs on the security of a mortgage, which provided that the interest on the mortgage-debt should be payable annually, and in default of payment of interest the mortgagee should be entitled to possession of the mortgaged property. Default was made in payment of the second instalment of interest, and in consequence the plaintiffs instituted this suit for possession of

(1) (1886) L. R. 32 Ch. D., 337.
(2) (1828) 8 B. and C., 71.
(3) (1867) 8 W. R., 1.
(4) (1873) 20 W. R., 375.

the mortgaged property. The mortgagor is illiterate, and the signature to the mortgage was made by the scribe of the deed by the direction and in the presence of the mortgagor. The following are the words which were written by the scribe in signing the deed on behalf of the mortgagor:—"Signed by Kukur Bind *alias* Umar Bind; the deed of simple mortgage is correct; by the pen of Shiunandan Lal, patwari." The deed was duly registered on the 28th of August 1896, when Kukur Bind appeared before the Registrar and acknowledged the due execution of the deed. The Court of first instance dismissed the suit on the ground that the mortgage had not been executed in accordance with the provisions of section 59 of the Transfer of Property Act, relying on the decision in the case of *Moti Begam* v. *Zorawar Singh* (1). On appeal the lower appellate Court upheld the decision of the Munsif. Hence the present appeal.

The words of section 59 which bear upon the question run as follows:—"Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument *signed by the mortgagor* and attested by at least two witnesses." In the decision to which I have referred it was held by a Bench of this Court that "where a mortgage was signed on behalf of a mortgagor, who was illiterate, by the scribe of the document not being *specially* empowered in this behalf, such a signature was not sufficient within the meaning of the section to validate the mortgage." One of the learned Judges who decided this case, my brother Aikman, held that "in the case of a mortgage the law requires the personal signature of the mortgagor," while my brother Knox held that "none but the mortgagor or some one vested by the mortgagor by deed in writing with full power to act as and for the mortgagor can execute such a document." It is contended on behalf of the appellants that this decision cannot be supported, that in accordance with the maxim *qui per alium facit per se ipsum facere videtur* (which I may translate, "he who does an act through another in the eyes of the law does it himself"), or, as the maxim is more familiarly known, *qui facit per alium facit per se*, signature by the authorized agent of a mortgagor is sufficient. This is an old and

(1) Weekly Notes, 1899, p. 196.

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well-recognised maxim, and, as it seems to me, ought to prevail, unless the Legislature makes it reasonably clear that its operation was intended to be excluded in the interpretation of a Statute. At common law where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. But there are, no doubt, cases in which a different construction must be put on particular Statutes, as in the case of the Statute of Frauds. Such was the case of *Hyde* v. *Johnson* (1), upon which reliance was placed by the learned Judges who decided the case of *Moti Begam* v. *Zorawar Singh*. It seems to me not to be open to argument that if there were nothing to be found in the other provisions of the Transfer of Property Act to exclude the operation of the common law rule, a signature by an agent acting under the authority of the mortgagor would satisfy the requirements of section 59 of the Act. A section, however, has been discovered which, it is contended, has this effect, and that is section 123. Section 123 is the second section of Chapter VII of the Act, which deals, not with mortgages at all, but with a different subject-matter, namely, gifts of movable and immovable property. We have not been pointed out, nor am I aware of any words in any of the sections of Chapter IV of the Act, which deals with mortgages of immovable property and charges, which throw any light upon the provisions of section 59. Section 123 runs as follows:—"For the purpose of making a gift of immovable property the transfer must be effected by a registered instrument signed *by or on behalf of the donor*, and attested by at least two witnesses." It is contended that, inasmuch as the Legislature used in this section the words "on behalf of" and did not use these words in section 59, the difference of language must be *primâ facie* regarded as indicative of intended difference of meaning. In his judgment in the case to which I have referred, my brother Aikman observes:—"The difference in the language of these two sections is striking. In the case of a gift the instrument must be signed 'by or on behalf of' the donor. In the case of a mortgage, like the one in suit, the instrument must be signed 'by the mortgagor.' Why the Legislature made this distinction I am unable" he says

(1) (1836) 2 Bing. N. C., 776.

"to understand; but the distinction is there and I am reluctantly forced to the conclusion that in the case of a mortgage the law requires the personal signature of the mortgagor. In my opinion," he goes on to say, "the case relied on by the appellant *Hyde* v. *Johnson* (1) is in point. To hold that the Legislature meant the same thing in section 59 as in section 123 would, in my judgment, be opposed to the ordinary canons of construction." Now let me see what is the language of section 123 to which so much weight has been attached by my learned brother. It provides that a transfer of immovable property must be effected by a registered instrument signed by or on behalf of the donor. Do these words "by or on behalf of the donor" accurately express the meaning of the Legislature, or are they a loose form of expression? What was intended by the Legislature is that the instrument should be signed either by the donor or by an agent authorized by him in that behalf, but the section does not say so. An instrument may be signed on behalf of a party without his authority. It was certainly not the intention of the Legislature that such a signature should be effectual. The language is clearly elliptical. It is not accurate draughtsmanship. We must supply after or in addition to the words "on behalf of" some such words as "by an agent duly authorized in that behalf." The section otherwise does not express the intention of the Legislature. Are we justified then in placing any reliance upon the use of the loose and vague words "on behalf of" contained in section 123—a section dealing with gifts of property—to elucidate the meaning of the plain and intelligible language used in section 59 of the Act—a section which falls within the part of the Act which deals with a different subject-matter, namely, mortgages? I am of opinion, with all deference to the views of my brother Aikman, that we cannot safely adopt such a course, and that it would not be consistent with the canons of construction to do so. Sir George Jessel in *Spencer* v. *Metropolitan Board of Works* (2), observed to the effect that we ought to find out the meaning of a section of an Act, if we can, from the section itself. If we can do that, we need not have recourse to other sections of the Act. If we cannot, then, he says, "I agree

(1) (1836) 2 Bing. N. C., 776. (2) (1882) L. R., 22 Ch. D., 142 at p. 142.

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with the principle which was laid down by Mr. Justice Chitty that, as a general rule, a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look through the other sections to see in what sense the word is there used." In the case of *Hyde* v. *Johnson*, upon which so much reliance has been placed, the Court was considering one of a series of enactments which made a distinction between the signing of a document by a party personally and the signing by an agent; and it was therefore considered that where signature by an agent was not mentioned the Act intended that the signature should be an autograph signature. The Act which we are considering is not of that nature. The Statute in that case required an acknowledgment to be signed "by the party chargeable thereby." The mischief aimed at by the Statute was to exclude temptation to perjury in the proof of agency, and it was contended in that case that if the signature of an agent were admitted, parol evidence also must be admitted to prove the agent's authority, and that then all the inconvenience would be reproduced which the Statute was passed to obviate. Moreover, in that case the 7th section of the Statute, 9 Geo. IV, Cap. XIV, under which the controversy arose, recites the 17th section of the Statute of Frauds, and the Court held that the Legislature must therefore have had that section in view at the very time of passing the Statute, and therefore must have intended the distinction between writings signed by a party or signed by his agent. A similar case is that of *Budoobhoosun Bose* v. *Enaet Moonshee* (1), and also that of *Luchmee Buxsh Roy* v. *Runjeet Ram Panday* (2), in which last-mentioned case it was held by their Lordships of the Privy Council that the acknowledgment referred to in the Limitation Act, Act No. XIV of 1859, section I (clause 15) must bear the signature of the mortgagee himself, and that the signature of an agent would not be sufficient. In that case their Lordships refer to the case of *Hyde* v. *Johnson* and to the language used by Chief Justice Tindal in his judgment, and then observe:—"It has been said that this case ought to be decided upon an equitable construction and not upon the strict words of the Statute; but their Lordships think Statutes

(1) (1867) 8 W. R., 1. (2) (1873) 20 W. R., 375.

of limitation, like all others, ought to receive such a construction as the language in its plain meaning imports. Statutes of limitation are in their nature strict and inflexible enactments. The object of the Legislature in passing them is to quiet long possession and to extinguish stale demands. Such legislation has been advisedly adopted in India as in this country. Their Lordships think that in construing these Statutes the ordinary rules of interpretation must prevail." I may observe that if such legislation was advisedly adopted in India, it was not followed in the amending Act. The Legislature altered the law in the subsequent Act, Act No. IX of 1871, and also in the Limitation Act, Act No. XV of 1877, whereby it is provided that the expression "signed by the party" in section 19 means "signed either personally or by an agent duly authorized in this behalf." But let me assume that we are entitled to call section 123 in aid of the interpretation of section 59. What light does it throw? As I have said, the signature of a deed of gift of immovable property made on behalf of a donor, but without his authority, clearly would have no efficacy. The signature to be effectual must be by a duly authorized agent. Now the Statute says nothing about a duly authorized agent; no doubt because the Legislature recognised the existence of the rule which enables a party to sign through the instrumentality of an agent, and by virtue of this rule a donor could authorize another to sign for him. Therefore the rule in question was manifestly before the minds of the framers of the Act. If the rule was before the minds of the framer of the Act, it appears to me obvious that if the intention had been to exclude its operation in the case of a mortgagor, it would have expressed that intention by requiring signature by the mortgagor personally, or with his own hand. The Legislature has, however, abstained from doing this; and therefore, as it seems to me, so far from there being anything in the Act to show an intention to exclude the rule, the reasonable inference to be drawn from the language of the Act is quite the contrary. If in section 123 the words "by his agent duly authorized in that behalf" had been inserted, I could better have understood the argument which has been advanced on behalf of the respondents,

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In the case of *The Queen* v. *The Justices of Kent* (1) the question of signature by an agent was considered. In that case the Commissioners of the Rother Levels made a rate of certain sums per acre on all lands lying within their jurisdiction, and the lands of one Wells, amongst others, were so rated. Wells, appealed against the rate to the Quarter Sessions. According to the provisions of section 1 of the Statute 12 and 13 Vict., Cap. XLV, under which the appeal was presented, a notice of appeal to a Quarter Sessions "should be in writing signed by the person or persons giving the same, or by his, her or their attorney, on his, her or their behalf." The notice of appeal in that case was signed in Wells' name by the clerk to his attorney by Wells' authority. It was objected on the part of the Commissioners that the notice of appeal was insufficient, as the signature of the appellant was not in his handwriting. The Quarter Sessions held that the notice of appeal was bad and dismissed the appeal. Upon a rule calling upon the Justices of Kent to show cause why a mandamus should not issue commanding them to cause to be heard and determined the appeal of Wells on the merits, the Court of Queen's Bench, consisting of Blackburn, Quain and Archibald, JJ., held that a notice of appeal signed in the appellants' name by the clerk to his attorney with the appellant's authority was sufficient. Blackburn, J., in his judgment says:—"No doubt at common law where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require a personal signature." He then refers to the case of *Hyde* v. *Johnson* as one coming within the purview of a Statute which requires personal signature and, referring to the case before the Court, observes:—"Here the clerk having full authority from the appellant signed for him, and this is a sufficient signing at common law. I see nothing in this Statute that makes a personal signature necessary, and the rule must therefore be made absolute." Quain, J., says:—"I am of the same opinion. We ought not to restrict the common law rule *qui facit per alium facit per se* unless the statute n. .es a

(1) (1873) L. R., 8 Q. B., 305.

personal signature indispensable." Archibald, J., says:—"I think this case comes within the common law rule *qui facit per alium facit per se*, and there is nothing in the Statute to qualify the operation of that maxim." In the case of *Ex parte Wallace* (1) a similar question arose on the Bankruptcy Rules of 1883. Rule 125 provides that "a creditor's petition shall be in form No. 10 in the Appendix with such variations as circumstances may require." Form No. 10 provides that "the petition shall be *signed by the petitioner*, and that his signature shall be attested by a witness," and the attestation clause contains the words "signed by the petitioner in my presence." In this case a petition in bankruptcy was presented by one William Richards against one Wallace, who carried on business in the city of London. The petition was signed "William Richards by his attorney Thomas Picton Richards." The signature was attested by a witness, and the attestation clause was as follows:—"Signed by the petitioner by his attorney Thomas Picton Richards in my presence." The objection was taken by the debtor to the petition that it was not duly signed as required by rule 125. The Registrar overruled the objection. Whereupon the debtor appealed. It was held by the Court of appeal, consisting of Baggallay, Bowen and Fry, L. JJ., that the petition was properly signed, that a bankruptcy petition by a creditor might be signed on his behalf by his duly constituted attorney. Baggallay, L. J., in the course of his judgment, remarks:—"The next question is, whether the signature of a bankruptcy petition by an attorney on behalf of the petitioner is a sufficient signature. I can entertain no doubt whatever that it is, provided that the power of attorney authorizes the signature." Again, in the case of *In re Whitley Partners, Limited*, (2), it was held that section 11 of the Companies Act, 1862, was complied with by the signature of an agent. Section 6 of that Act provides that "any seven or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with the requisitions of this Act in respect of registration, form an incorporated company" and by section 11 it is provided that the memorandum of association shall be "signed by each subscriber in the presence of and

(1) (1884) L. R., 14 Q. B. D., 22. (2) (1886) L. R., 32 Ch. D., 337.

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attested by one witness at least." It was contended that the Statute required the personal signature of each subscriber, and *Hyde* v. *Johnson* was relied on in support of this contention; but the Court, consisting of Cotton, Bowen and Fry, L. JJ., unanimously held that, there being nothing in the Company's Act, 1862, to show that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient. Lord Justice Bowen says in the course of his judgment as regards the question of law:—"It is contended by the appellant that it is not sufficient for a man to sign the memorandum of association by an agent, but that he must sign it himself. In every case where an Act requires a signature, it is a pure question of construction on the terms of the particular Act whether its words are satisfied by signature by an agent. In some cases on some Acts the Courts have come to the conclusion that the personal signature was required. In other cases on other Acts they have held that signature by an agent was sufficient." Commenting upon *Hyde* v. *Johnson* he says:—"*Hyde* v. *Johnson* was decided on the ground that Lord Tenterden's Act was to be read along with the Statute of Frauds, which expressly refers to the signature by an agent, and that a clause which contained no reference to an agent was therefore to be held to require personal signature. In the present Statute there is nothing in the way in which the memorandum of association is dealt with to show that the Legislature intended anything special as to the mode of signature."

It appears to me upon these authorities to be indisputable that if there is no clear indication that the Legislature intended that the signature shall be an autograph signature, the common law rule *qui facit per alium facit per se* should be applied. If the Legislature in this case had intended that an illiterate mortgagor in this country should not enjoy the privilege of employing an amanuensis to sign his name, it seems to me that it would have expressed its intention by the introduction of some such words in the section after the word "signed" as "personally" or "with his own hand." The introduction of the loose words to which I have referred in section 123 appears to me to furnish totally inadequate grounds for the conclusion that the Legislature

intended to exclude the application of the rule to section 59. In an unreported case in this High Court (*Khunni Lal* v. *Jhao Lal*, S. A., No. 48 of 1895) a Bench of this Court, consisting of my brothers Knox and Burkitt, decided this very question, and held that the signing of a mortgage on behalf of an illiterate person by the scribe of the deed at the instance of the mortgagor was a good signature within the meaning of section 59. The learned Judges in their judgment say that "it is true that the manual act of signing was effected in this case by the hand of another, but the lady by her acts has acknowledged that the act was done with her consent and for her, and in this way is her act. We are unable to draw the distinction the Judge does between the words contained in section 59 and those contained in section 123 of Act No. IV of 1882."

I have said nothing as to the view adopted by my brother Knox in the case of *Moti Begam* v. *Zorawar Singh*, as this view has not been pressed in argument before us on the part of the respondents, and I am aware that the learned Judge does not now support it. Having regard to the scope and object of the Transfer of Property Act and to its language, I see no good grounds for placing the limited construction on section 59, which was adopted in the case of *Moti Begam* v. *Zorawar Singh*, and, with all deference to the views of my brother Aikman, I am of opinion, for the reasons which I have stated above, that the decision in in that case cannot be supported. I would therefore allow the appeal in this case, set aside the decrees of the Lower Courts, and remand the case to the Court of first instance for trial on the merits.

KNOX, J.—In *Moti Begam* v. *Zorawar Singh* (1) I laid it down in my judgment that the terms of section 59 of the Transfer of Property Act, 1882, required that a deed intended to operate as a mortgage deed must be signed either by the mortgagor himself or by some one vested by him with full power to act as and for the mortgagor. This power, I further held, must be a power contained in a written instrument. I was led to this result mainly, if not entirely, by arguments based upon the different language used in section 59 and in section 123 of the Act.

(1) Weekly Notes, 1899, p. 196.

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A closer examination, however, of section 123, and of the words used in it, as the learned Chief Justice has pointed out in the able and well-reasoned judgment which I have had the privilege of reading, and in which I fully concur, satisfies me that the words "signed by or on behalf of the (donor)" were never intended, either expressly or by implication, to conflict or to mark any difference between them and the words "signed by the (mortgagor)." In the present case I am not concerned with section 123. The words used in section 59 "signed by the mortgagor," when read by themselves, are clear and free from ambiguity. This being so, it is my duty to infer that the Legislature intended to mean what it has plainly expressed and to interpret these words as I should interpret them in any other document or Act. So interpreted they would mean signed by the mortgagor or by another for him and by his authority. To limit them to the mortgagor personally requires that there should be something either in the language or in the object of the Act which showed that a personal act was intended. There is nothing in the language of the section which expresses such an intention, and nothing that I know of—nothing has been pointed out to me—which expresses that such an intention was in the mind of the framers of the Act. The Act is set out in its preamble as an Act intended to define and amend certain parts of the law relating to the transfer of property by act of parties. Before Act No. IV of 1882 came into force, a transfer by mortgage was a good and valid instrument, whether it were executed by the mortgagor personally, or by some one signing for him. If there had been an intention to curtail this freedom, express words of limitation would have been used; and it would not have been left to be inferred by a construction drawn from words contained in another remote section of the Act dealing with another class of transfer. If the framers of the Act then had intended to exclude the operation of the well-known maxim *qui facit per alium facit per se*, they could easily have done so, and would have done so. The presence of a deed in writing to act as and for the mortgagor is not required by any law that has been pointed out. In the present case the signature of Kukur Bind, the mortgagor, who is an illiterate man, was made by the direction of Kukur Bind in his presence and by his direction: the

patwari who performed the manual act of signing was, so to speak, the hand of Kukur Bind. For these reasons I join in the order proposed by the learned Chief Justice.

BLAIR, J.—I have also had the advantage of perusing at leisure the exhaustive judgment of the Chief Justice, and I concur in the order proposed by him, and the reasons upon which that order is founded.

BANERJI, J.—This appeal arises in a suit brought by the appellants for recovery of possession of three bighas and odd biswas of land as mortgagees thereof under a deed of simple mortgage dated the 25th of August, 1896, executed in their favour by the respondent Kukur Bind for a sum of Rs. 381. The deed was not signed by him, nor does it bear his mark. But his signature was written on it by one Shiunandan Lal, patwari. It has been found that Kukur Bind is an illiterate person, unable to write his name, and that he authorized the patwari Shiunandan Lal, who is the writer of the document, to affix his signature to it. Default having been made in the payment of interest in compliance with the terms of the deed, the present suit was brought against the mortgagor and subsequent transferees from him. The defendants disputed the validity of the mortgage on the ground that it had not been effected in accordance with the provisions of section 59 of the Transfer of Property Act, 1882. Both the Courts below have allowed this contention, relying upon the ruling of this Court in *Moti Begam* v. *Zorawar Singh* (1) and have dismissed the suit. The ruling referred to undoubtedly supports the decision of the Courts below. It may, however, be observed that a contrary opinion was expressed by this Court in S. A. No. 48 of 1895, decided by Knox and Burkitt, JJ., on the 3rd of April, 1897. That case unfortunately has not been reported.

Doubts having been entertained as to the correctness of the ruling in *Moti Begam* v. *Zorawar Singh*, this case was referred to a Full Bench. The question we have to determine is, whether a mortgage is validly effected, where the principal money secured is Rs. 100 or upwards, if the mortgage deed is not signed personally by the mortgagor, but is signed for him

(1) Weekly Notes, 1899, p. 196.

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by another under his authority, such authority not having been granted by deed in writing.

With all respect for the learned Judges who decided the case of *Moti Begam* v. *Zoravar Singh*, I am unable to agree with the view adopted by them in that case. With reference to the provisions of section 59 of the Transfer of Property Act, the learned Judges do not appear to have held the same view. Whilst Mr. Justice Knox was of opinion that the Legislature "purposely intended that no one but the mortgagor, or some one vested by the mortgagor by deed in writing with full power to act as and for the mortgagor, can execute such a document," Mr. Justice Aikman held that section 59 requires the personal signature of the mortgagor.

In my opinion there is no warrant for holding that if the mortgagor authorized another to affix his signature to the instrument of mortgage, the authority should have been given by deed in writing. By section 4 of the Transfer of Property Act the chapters and sections of the Act which relate to contracts should be taken as part of the Indian Contract Act, 1872. Section 187 of the Indian Contract Act provides that the authority of an agent may be "given by words spoken or written." So that it is clear that an agent may be verbally authorized to act for his principal. Further, the act of an agent may be ratified by the principal, and under section 196 of the Contract Act, upon such ratification the same effect will follow as if the act had been performed by the authority of the principal. By section 197 ratification may be expressed or may be implied from the conduct of the person on whose behalf the act is done. In this case the mortgagor having caused the mortgage deed to be registered by admitting execution of it, thereby ratified the act of Shiunandan Lal. It has also been found, as stated above, that the mortgagor Kukur Bind authorized Shiunandan Lal to affix his signature to the mortgage deed. Therefore upon the view of Mr. Justice Knox that a mortgage deed may be validly signed for the mortgagor by another who has been authorized in that behalf, the mortgage in this case was validly effected. And it was not invalid by reason of the fact that the authority was not granted in writing.

We have next to consider whether, as held by Mr. Justice Aikman, section 59 of the Transfer of Property Act requires that a mortgage deed should be signed personally by the mortgagor.

That section runs as follows :—"Where the principal money secured is one hundred rupees or upwards a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

The general rule is, that a man may sign by an agent. In *The Queen* v. *The Justices of Kent* (1) Blackburn, J., observed :—"No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature." Quain, J., said in the same case :—"We ought not to restrict the common law rule, *qui facit per alium facit per se* unless the Statute makes a personal signature indispensable." Similar observations were made by Archibald, J. In *In re Whitley Partners, Ld.* (2), Cotton, L. J., said :—"I think it would be wrong to hold that an enactment simply referring to signature is not satisfied by signature by means of an agent." He added :—"Suppose seven persons sitting round a table with a view to signing a document, and one of them says to another 'sign it for me,' are we to say that the signature affixed under this authority is insufficient? I am of opinion that it is quite effectual." These cases are clear authority for holding that where an enactment provides that a document should be signed by the executant, that alone does not make it indispensable that the signature should be affixed by the executant himself. Upon the question before us, the two cases referred to above are, in my opinion, very instructive, and are more in point than the case of *Hyde* v. *Johnson* (3), on which reliance has been placed on behalf of the respondents.

In *The Queen* v. *The Justices of Kent* the question was, whether a notice of appeal, signed in the appellant's name by the clerk to his attorney and not by the appellant himself, was sufficient under the Statute 12 and 13 Vic., Cap. XLV., section 1, which required that a notice of appeal to a Court of Quarter

(1) (1873) L. R., 8, Q. B., 305. (2) (1886) L. R., 32 Ch. D., 337.
(3) (1836) 2 Bing. N. C., 776.

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Sessions shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf. It was held that the signature by the clerk who had full authority from the appellant was sufficient.

The case of *In re Whitley Partners, Limited,* was one under the Companies Act, 1862. Section 11 of that Act provides that "the memorandum of association shall be signed by each subscriber in the presence of, and attested by, one witness at least." It was contended in that case, as has been contended on behalf of the respondents in this case, that as nothing was said in the Statutes about signature by an agent, these expressions must mean that the signature is to be affixed by the subscriber himself, and *Hyde* v. *Johnson* was referred to. Their Lordships repelled the contention, and held that there being nothing in the Companies Act to show that the Legislature intended anything special as to the mode of the signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient.

Did the Legislature, in enacting section 59 of the Transfer of Property Act, intend anything special as to the mode of signing a mortgage deed, that is to say, did it intend that the signature should be affixed personally by the mortgagor? It is common knowledge that in this country an illiterate person when executing a document causes his signature to be written for him by the scribe, the executant himself only touching the pen, and that such signature is regarded as the signature of the executant himself (see Gour's edition of the Transfer of Property Act, p. 266). That this is so is also apparent from the fact that, except the case of *Moti Begam* v. *Zorawar Singh* and the unreported case to which reference has been made above, there was, as far as I am aware, no other case in this Court in which, before the ruling in *Moti Begam's* case, the validity of a mortgage was questioned on the ground now raised, and that since the decision of that case the question has been raised on the basis of it in a large number of cases now pending in this Court. I may add that I am not aware of, nor have we been referred to any case decided by any of the other High Courts in which the question now before us was raised, or the view adopted in *Moti*

Begam's case found favour. Now, did the Legislature by enacting section 59 intend to abrogate the existing practice and make a new departure? In support of the contention that such was the intention of the Legislature, reference has been made to section 123 of the same Act, which provides that—"For the purpose of making a gift of immovable property the transfer must be effected by registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." From the difference in the language of the two sections and the use in section 123 of the words "or on behalf of," which do not appear in section 59, it is urged that the law requires the personal signature of the mortgagor in the case of a mortgage. With regard to this contention it may first be observed that as the two sections deal with different matters, the language used in one of them cannot, according to ordinary rules of construction, be "looked at as a guide to the construction of the other." In the next place, the words "on behalf of" in section 123 are, in my opinion, surplusage. "Many instances may be found of provisions put into Statutes merely by way of precaution." (See Hardcastle on the construction and effect of Statutory Law, 2nd ed., p. 121.) Section 123 seems to me to be one of such instances. Further, the adoption of the construction of section 59 for which the respondents contend will manifestly lead to great anomaly. Under section 123 a gift by which a person may divest himself of the whole of his property may be validly made by an instrument signed, not personally by himself, but on his behalf by an agent. In the case of a sale by which the vendor's immovable property is absolutely transferred, his personal signature is not requisite, nor is it requisite in the case of a lease or exchange of immovable property. Yet we are asked to hold that in the case of a mortgage, which is only the transfer of an interest in immovable property for the purpose of securing the payment of money borrowed, the Legislature requires that the personal signature of the mortgagor is indispensable. As observed by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (1) "a construction which leads to a result so whimsical ought not to be adopted without good reason."

(1) L. R., 1891 A. C., 531, at p. 587.

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No reason whatever has been suggested on behalf of the respondents for attributing to the Legislature such anomalous provisions. And in the case of *Moti Begam* v. *Zorawur Singh* my brother Aikman concedes that he is unable to understand why the Legislature should have made a distinction in the case of a mortgage. I am therefore unable to hold that by inserting the words "on behalf of" in section 123, and omitting those words from section 59, the Legislature intended to lay down in the latter section a different rule from that provided in the former.

Considerable stress was laid by the learned counsel for the respondents upon the ruling in *Hyde* v. *Johnson* (1) and on that of the Privy Council in *Luchmee Buxsh Roy* v. *Runjeet Ram Panday* (2) which followed *Hyde* v. *Johnson*. He also relied on *Budoobhoosun Bose* v. *Enaet Moonshee* (3). Those were cases relating to the Law of Limitation, and proceeded upon the principle that "where there is a statutory bar, and there is a statutory exception to that bar by an acknowledgment of a certain character, the acknowledgment must, to be effectual, be strictly in accordance with the wording of the Statute." (Banning on the Limitation of Actions, 2nd edition, p. 38.) The rule of interpretation adopted in the cases referred to cannot therefore be held to be applicable to a case like the present. Even in regard to an acknowledgment within the meaning of the Law of Limitation, it appears to have been held in Ireland that "if a person signs the name of the principal by his direction in his presence, it is sufficient, for the person signing must be looked on, not as the agent, but as it were the hand or instrument of the principal himself." [*Lessee of Corporation of Dublin* v. *Judge*, (4) cited in Darby and Bosanquet's Statutes of Limitation, 2nd edition, p. 382.] Upon the authority of the same case it is said in Banning on Limitation (2nd ed., p. 127), with reference to the general rule which at one time prevailed that an acknowledgment must be signed personally by the debtor, that "notwithstanding this, a signature may, it seems, be so signed by an agent under the immediate direction and the supervision of the

(1) (1836) 2 Bing. N. C., 776.
(2) (1873) 20 W. R., P. C., 375.
(3) (1867) 8 W. R., 1.
(4) 11 Ir. L. R., 8.

principal as to be in effect the signature of the principal, especially where the latter is incapacitated by illness or otherwise from signing himself."

I am of opinion that section 59 of the Transfer of Property Act does not require the personal signature of the mortgagor, and that if his signature is affixed to the instrument of mortgage by another under his authority, that is in effect the signature of the mortgagor himself, and is sufficient to constitute a valid mortgage. With all deference, I think the case of *Moti Begam* v. *Zorawar Singh* was wrongly decided and should be overruled. I would allow the appeal, set aside the decrees of the Courts below, and remand the case to the Court of first instance for trial on the merits.

AIKMAN, J.—In this case I have the misfortune to differ from the opinion arrived at by the learned Chief Justice and my learned colleagues. The question which we have to decide in the appeal is a short one, namely, whether Act No. IV of 1882 requires a deed of mortgage to be signed personally by the executant. I have already expressed my views as to this in the case of *Moti Begam* v. *Zorawar Singh* (1). I have listened to the argument of the learned counsel for the appellants based on section 4 of the Act and the provisions of the Contract Act; but his argument, ingenious though it was, has failed to remove my difficulties, or induce me to depart from the conclusion I came to in the case mentioned above—a conclusion arrived at after much anxious consideration and with great reluctance.

I have not much to add to the judgment I delivered in that case. In the case of *The Queen* v. *The Justices of Kent* (2), Blackburn, J., observed:—"No doubt at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it. Nevertheless there may be cases in which a Statute may require personal signature." In the case of *In re Whitley Partners, Ld.* (3) Bowen, Lord Justice, says:—"In every case where an Act requires a signature, it is a pure question of construction on the terms of the particular Act whether its words are satisfied

(1) Weekly Notes, 1899, p. 196. (2) (1873) L. R., 8 Q. B., 305.
(3) (1886) L. R., 32 Ch. D., 337.

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by signature by an agent." It being clear then that, notwithstanding the maxim *qui facit per alium facit per se*, there may be Acts which require the personal signature of an executant, the question for decision here is whether Act No. IV of 1882 does require such a signature in the case of a mortgage. Had we only to construe section 59 of the Act, I should have no difficulty in coming to the conclusion on the authority of the case last mentioned, that the provisions of the section are sufficiently complied with if the deed is signed by the authority of the mortgagor. But that section does not stand alone. In the case of *Hyde* v. *Johnson* (1) the Court was considering one of a series of enactments dealing with the same subject. As one of those enactments referred to signature by an agent and another enactment with was *in pari materiâ* did not, it was held that under the latter Statute personal signature was required. The present case is even stronger than the case of *Hyde* v. *Johnson*, for here we have not to consider different Statutes, but one and the same Act dealing with one subject. The present case stands more on a par with the cases which were decided under Act No. XIV of 1859. That Act in dealing with acknowledgments which extend the period of limitation, provided as to two of the acknowledgments in section 1, sub-section (15) and section 4, that the acknowledgment should be signed by the person making it. In section 19 a third acknowledgment is referred to, and this last section provides that the acknowledgment may be signed by the person making it or his agent. In the case *Luchmee Buxsh Roy* v. *Runjeet Ram Panday* (2), the Privy Council had to consider a plea that an acknowledgment falling within section 1(15) was sufficient if signed by an agent. Their Lordships repelled that contention. They said:—"The Statute must receive a construction according to its plain words. It requires the signature of the party himself, namely the mortgagee, and it would be a wrong construction of it to hold that any other signature would satisfy those words." They then go on to quote a passage from the judgment of Chief Justice Tindal in the case of *Hyde* v. *Johnson* (3) referred to above, which runs as follows:—"When

(1) (1836) 2 Bing. N. C., 776. (2) (1873) 20 W. R., P. C., 375.
(3) (1836) 2 Bing. N. C., 776.

therefore we find in the Statute now under consideration that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the Statute, and that we should be legislating, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." Their Lordships say that they entirely adopt that principle of construction which they held to be applicable to the case before them. In the case of *Budoobhoosun Bose* v. *Enaet Moonshee* (1) the effect of section 4 of Act No. XIV of 1895 had to be considered. Peacock, C.J. and Hobhouse, J., concurred in the view that it would be legislating, not interpreting, to extend the operation of that section to acknowments signed, not by the party chargeable therewith, but by his agent. In the present case we have to construe an Act of the Indian Legislature dealing with the subject of transfers of property by act of parties. As to one species of transfer the Legislature has been fit to enact that the necessary deed must be signed by the executant. As to another species of transfer the Legislature has seen fit to allow the necessary deed to be signed "by or on behalf of" the executant *(vide* section 123). It must be admitted that we have here a striking difference in the language of the two sections. As observed by my brother Knox in his judgment in the case of *Moti Begam* v. *Zorawar Singh*, "it must be presumed that the difference in language was intentional." In my humble opinion we are bound to give effect to this difference. I do not think that it would be in accord with the true canons of construction, to hold that the Legislature, in using such different language in those two sections, meant exactly the same thing. It was suggested that the difference in the language might have arisen from careless drafting. I do not think that a Court is entitled to make any such assumption. If, however, the Legislature has made a mistake, then, in my humble judgment, it is for the Legislature, and not for the Courts, to correct that mistake. As was observed by Lord Brougham in the case of *Crawford* v. *Spooner* (2):—"We cannot aid the Legislature's defective phrasing of the Act; we cannot add and mend, and by construction make up deficiencies which are left there." For the

(1) (1867) 8 W. R., 1. (1) (1846) 6 Moo., P. C., 1 at p. 9.

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reasons set forth above, and also for the other reasons given in my judgment in the case of *Moti Begam* v. *Zorawar Singh*, I am of opinion that the lower Courts were right in holding, with reference to the language of Act No. IV of 1882, that there was no valid mortgage, and I would dismiss this appeal with costs.

Appeal decreed and cause remanded.

APPELLATE CIVIL.

1902
February 24.

Before Mr. Justice Knox and Mr. Justice Blair.

TEJ SINGH AND OTHERS (DEFENDANTS) *v.* CHABELI RAM (APPLICANT).*

Civil Procedure Code, sections 2, 372, 588(21)—*Order allowing objection under section* 372—*Order or decree—Appeal.*

A suit was brought by one Mewa Ram against Tej Singh and others. That suit was decreed *ex parte*. An application was, however, made by the defendants under section 108 of the Code of Civil Procedure, as the result of which the *ex parte* decree was set aside and the suit reinstated. Upon the restoration of the suit one Chabeli Ram, claiming to be an assignee of the rights of the original plaintiff, applied under section 372 of the Code that his own name might be substituted as plaintiff for that of Mewa Ram. The plaintiff did not oppose this application. But the defendants objected, and the application was rejected. Subsequently, on the same day, the suit was dismissed. Chabeli Ram appealed against the Court's order rejecting his application under section 372 of the Code. His appeal was allowed, and his name was brought on the record. This appeal seems to have been treated as also an appeal from the decree in the suit, and the Court made an order under section 562 of the Code remanding the suit for trial on the merits.

Held on appeal from this order that no appeal lay to the lower appellate Court from the order of the Court of first instance allowing the defendants' objections to Chabeli Ram's application under section 372 of the Code of Civil Procedure; neither was such order a decree within the meaning of section 2. *Moti Ram* v. *Kundan Lal* (1) and *Indo Mati* v. *Gaya Prasad* (2) distinguished. *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (3) referred to.

IN this case one Mewa Ram brought a suit for sale on a mortgage against Tej Singh and others. The suit was originally decreed *ex parte*, but upon an application being made under section 108 of the Code of Civil Procedure, the *ex parte* decree was

* First Appeal No. 3 of 1901 from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 17th of November, 1900.

(1) (1900) I. L. R., 22 All., 380. (2) (1896) I. L. R., 19 All., 142.
(3) (1900) 4 C. W. N., 403.

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set aside and the case reheard. On the suit being reinstated one Chabeli Ram applied to the Court asking that his name might be substituted for that of Mewa Ram, the original plaintiff, on the ground that Mewa Ram had assigned to him (the applicant) all his rights in the subject-matter of the suit. To this application the plaintiff made no objection, but it was opposed by the defendants, who alleged the transfer to be fictitious. In the end Chabeli Ram's application was disallowed, and on the same day, but after the above-mentioned order had been passed, the suit was dismissed. Chabeli Ram then appealed from the order rejecting his application under section 372 of the Code of Civil Procedure. Upon this appeal the District Judge of Aligarh brought Chabeli Ram upon the record, and then, apparently treating the appeal as if it was an appeal from the decree in the suit, made an order of remand under section 562 of the Code of Civil Procedure. Against this order of remand the defendants appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *Abdul Majid* and Munshi *Gobind Prasad*, for the respondent.

KNOX and BLAIR, JJ.—To the suit out of which this appeal has arisen the original parties were Mewa Ram, plaintiff, and Tej Singh and others, defendants. The suit was decreed *ex parte*. An application, however, was made under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside, and the case reheard. This application was successful. Upon the suit being reinstated the present respondent, Chabeli Ram, prayed that his name might be brought on the record, alleging that an assignment had been made in his favour by the plaintiff of the plaintiff's right. The plaintiff consented to Chabeli Ram's name being substituted instead of his own. The defendants, on the other hand, objected, contending that the transfer was a fictitious one; the application under section 372 was accordingly disallowed, and on the same day, but after the order above-mentioned had been passed, the suit was dismissed. Chabeli Ram then appealed from the order rejecting the application made under section 372; this appeal was allowed, and his name was brought on the record. Apparently some confusion ensued which has

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not been explained, as the matter before the lower appellate Court was treated when the appeal went to hearing as an appeal from the decree. The result was that an order was passed under section 562, remanding the suit to the Court of first instance for decision on the merits; and it is at this stage and from this order that this first appeal from order has been brought.

A preliminary objection has been taken before us that an appeal does not lie, and that the order passed under section 372 was not open to appeal. On looking back, however, into the record of the case we find that the lower appellate Court has dealt with the decree which was passed in the suit, and from which an appeal undoubtedly did lie under section 540 of the Code of Civil Procedure; so that what we have to consider now is really whether the lower appellate Court could have entertained any appeal against the order refusing to substitute the respondent as plaintiff in the cause.

Section 588, clause (21) provides that an appeal shall lie from an order disallowing an objection under section 372; but as the section does not allow appeals from any orders except those specially set out in section 588, it follows and has been held that no appeal lies under section 588 of the Code from an order allowing an objection under section 372. The case before us is such an order. But we were referred to the case of *Moti Ram* v. *Kundan Lal* (1). The learned Judges who decided that case viewed the order which was before them as an order which adjudicated on the representative right claimed by the applicant under section 372, and therefore amounting to a decree, as that word is defined in section 2 of the Code. They appear in arriving at this decision to have been influenced by the case of *Indo Mati* v. *Gaya Prasad* (2). The case of *Indo Mati* v. *Gaya Prasad* has been considered by the Calcutta High Court in the case of *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (3). That Court held that the case before them was as to its facts widely different from the facts disclosed in *Indo Mati* v. *Gaya Prasad*. They had before them no question relating to the execution of a decree, inasmuch as no decree had at the time when the applica-

(1) (1900) I. L. R., 22 All., 380. (2) (1896) I. L. R., All., 142.
(3) (1900) 4 C. W. N., 403.

tion was disallowed been passed, and no final decision in the suit had been given. The *ratio decidendi* therefore in *Indo Mati* v. *Gaya Prasad* did not apply to the case before them, and was, in their opinion, clearly distinguishable.

In the case before us, while it is true that there had been an *ex parte* decree, that *ex parte* decree had been set aside, and had therefore become non-existent. While it was so non-existent Chabeli Ram filed his application. The refusal to allow his name to be brought upon the record, while it may have been a formal expression of an adjudication of a right claimed by him, did not, so far as the Court expressing it, decide the suit. The decision of the suit resulted immediately from the order under which the suit was dismissed—an order passed after the order adjudicating upon Chabeli Ram's claim to be brought into the suit. The case of *Indo Mati* v. *Gaya Prasad* is really an authority which holds that no appeal lay from the order passed under section 372, and it is in this respect against the respondent Chabeli Ram. In the case reported at page 380 of the I. L. R., 22 All., 372, there was a decree extant, and the application under section 372 was made after that decree had been passed: no attempt moreover had been made by the applicants to have their names brought upon the record in the Court of first instance. In any case the facts in *Moti Ram* v. *Kundan Lal* are not the same as the facts before us. Chabeli Ram headed his petition of appeal as an appeal from the whole of the decree passed by the Subordinate Judge: in *Moti Ram* v. *Kundan Lal* the applicant had only asked to be allowed to appeal, and it was with the order disallowing that application that this Court then dealt. This is manifest from the terms of the final order which run thus:—"We direct that the applicants be now brought on the record, and we remand the record to the Court of the District Judge with orders to decide whether the memorandum of appeal, dated the 23rd August, 1897, should or should not be admitted; and if admitted, to hear and decide the appeal according to law."

It is enough for us to show that the facts in that case differ from the facts before us; they also differ from the facts in *Indo Mati* v. *Gaya Prasad*, and our decision is based upon these two points— (1) that no appeal is allowed by section 588, sub-section

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(21), from an order allowing an objection under section 372; and secondly, that the order passed in the present case was not a decree within the meaning of section 2, *viz.* an adjudication so far as regards the Court expressing it which decided the suit pending before the Court at the time when the order was passed.

We decree the appeal with costs, and set aside the judgment of the lower appellate Court.

Appeal decreed.

1902
March 18.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

IN THE MATTER OF SHEIKH AMIN-UD-DIN.*

Criminal Procedure Code, sections 435, 438, 439 — *Practice—Revision—Reference by District Magistrate recommending the reconsideration of an order of acquittal passed by a Subordinate Magistrate.*

In the case of an acquittal by a Subordinate Magistrate, where the Local Government does not appeal, or where the District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference direct from the District Magistrate under section 438 of the Code of Criminal Procedure.

THIS was a reference made by the District Magistrate of Aligarh under section 438 of the Code of Criminal Procedure. The circumstances out of which the reference arose are thus stated in the Magistrate's order:—

"On the 16th of November, 1901, seven logs of wood—three of *siris* and four of *semal* wood—were imported by Sheikh Amin-ud-din. As they passed the Russelganj octroi barrier, the six carts which carried them were stopped by the octroi officials for payment of duty. A question arose as to whether the logs were to be charged as fire wood at the rate of three pies per rupee of their value or as building material at the rate of eight pies per rupee. The octroi muharrir and also the octroi superintendent, who happened to arrive on the spot, were of opinion that they were building material and should be charged accordingly. Amin-ud-din, accused, who had also turned up, wanted the duty to be levied as on fire wood. The dispute came to an end by the accused assuming a tone of authority, and ordering the octroi officials to charge the logs as fire wood, which he declared them to be. The octroi officials submitted against their own judgment, and allowed the logs to pass into the town on payment of the lower duty, although the prosecution alleged they were not fire wood, and were consequently liable to be charged as 'building

* Criminal Reference No. 149 of 1902.

material.' The Secretary of the Municipality discovered these facts on his morning rounds and reported them to the Chairman. The logs were removed by the Secretary's orders from the accused's timber shop to the Municipal bonded warehouse where they were kept till the close of the trial. Two days later the Chairman himself visited the warehouse and inspected the logs, and being satisfied that they were not fire wood, ordered the prosecution of Sheikh Amin-ud-din, as there could be no doubt that Sheikh Amin-ud-din, himself a timber merchant, could not have made a mistake as to how the logs could be used, and the only motive for making a statement so wilfully false could be the evasion of payment of the proper duty."

The case was tried by an Assistant Magistrate, Mr. Badhwar, who acquitted the accused upon various grounds to which it is unnecessary now to refer.

The Magistrate of the District, being of opinion that the order of acquittal was entirely wrong, referred the case to the High Court, asking that the order of acquittal might be set aside.

On this reference

Colvin, for the person acquitted, raised a preliminary objection that the High Court could not interfere in revision, because an appeal might have been preferred by the Local Government from the order of acquittal passed by the Assistant Magistrate. He referred to section 439, clause (5) of the Code of Criminal Procedure.

The Assistant Government Advocate *(Porter)*, in support of the reference, argued that the hearing of the present reference, though it might be considered as "proceedings by way of revision," was not "at the instance of the party who could have appealed." The District Magistrate (who was not to be confounded with the Local Government) could not have appealed from the order of his assistant; but under section 435 of the Code of Criminal Procedure he could call for the record, and under section 438 of the Code he could examine the record, and report for the orders of the High Court the result of such examination. It made no difference whether the record under examination happened to terminate with an order of acquittal and not an order of conviction.

KNOX and BLAIR, JJ.—A preliminary objection has been taken to the hearing of this reference. It is contended that the provisions of the last paragraph of section 439 apply. We are not prepared to accede to this contention, or to say that we shall

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IN THE MATTER OF SHEIKH AMIN-UD-DIN.

in no case entertain a reference simply because of what is laid down in that paragraph. At the same time the fact remains that it was open to the Local Government to present an appeal from this acquittal. Where the Local Government do not adopt this procedure, or where the Magistrate does not move the Local Government to adopt this procedure in cases where it could be adopted, and sends to us direct, we think it expedient, as a general rule, not to exercise our powers of revision. We refuse to entertain the reference. Let the record be returned.

1902
April 2.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

IN THE MATTER OF THE PETITION OF PADMA DAT JOSHI.*

Act No. XVIII of 1879 *(Legal Practitioners Act), sections* 6 *and* 8—*Act No. XIV of* 1874 *(Scheduled Districts Act), sections* 3, 5 *and* 6—*Kumaun Rules, 27th July*, 1894, *rules* 2 *and* 11—*Jurisdiction of the High Court as regards enrolment of vakils in the province of Kumaun and Garhwal.*

For the purposes of the Legal Practitioners' Act, 1879, the Commissioner of Kumaun is the High Court for the Province of Kumaun and Garhwal. A vakil, therefore, whose name is enrolled in the High Court of Judicature for the North-Western Provinces is not, by virtue of such enrolment, entitled to practise in the Courts of Kumaun and Garhwal, nor has the High Court of Judicature for the North-Western Provinces any jurisdiction to reverse an order of the Commissioner of Kumaun refusing to enrol a vakil on the roll of legal practitioners entitled to practise in the Courts of Kumaun and Garhwal.

This was an application by one Padma Dat Joshi, a pleader, who had been enrolled as such by the High Court for the North-Western Provinces, praying that certain orders of the Commissioner of Kumaun refusing to enrol him as a pleader under section 8 of the Legal Practitioners Act, 1879, qualified to practice in the Court of the Sessions Judge of Kumaun and of the Subordinate Magistrates, in all Revenue Offices and also in the Commissioner's Court in respect of the cases referred to in rule (11) of the Kumaun Rules might be set aside, and that the

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* Miscellaneous No. 175 of 1901.

Commissioner of Kumaun might be directed to enrol him as such pleader, and to permit him to practise in the said Courts and offices.

The applicant was duly enrolled as a pleader by the High Court on the 19th of August, 1898. He subsequently made several applications to the Commissioner of Kumaun for license to practice as a pleader in Garhwal or at Naini Tal or Almora, as also in Kumaun. These applications were refused on the ground that the Commissioner did not consider that the number of vakils and pleaders in his division should be increased. From this refusal the applicant appealed to the High Court.

Mr. *A. E. Ryves*, for the Commissioner of Kumaun, raised a preliminary objection to the hearing of the appeal on the ground that the order sought to be appealed was one passed by the Commissioner of Kumaun acting as the High Court for Kumaun under Act No. XVIII of 1879.

The High Court for the North-Western Provinces has no inherent jurisdiction over Kumaun. Its jurisdiction in Kumaun is limited to that provided for by the Criminal Procedure Code and the rules framed by the Local Government under Act No. XIV of 1874. Under these rules, which have the force of law, the High Court for the North-Western Provinces is appointed to be the High Court for Kumaun for all the purposes of the Criminal Procedure Code, the Indian Succession Act, the Indian Companies Act, and the Indian Railways Act and for no other purposes. For all other purposes the Commissioner of Kumaun is appointed to be the High Court for Kumaun, and therefore for the purposes of the Legal Practitioners Act.

The Legal Practitioners Act enacts by section 8 that when a legal practitioner has been enrolled as such by a High Court, he shall be entitled to practise in all Subordinate Courts situate within the local limits of that High Court's appellate jurisdiction. The Kumaun Courts are not subordinate ordinarily to the appellate jurisdiction of the High Court for the North-Western Provinces: they are only so subordinate with reference to the four Acts previously mentioned.

Pandit *Baldeo Ram Dave* for the applicant argued that the High Court for the North-Western Provinces had appellate

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jurisdiction over Kumaun and Garhwal at any rate in all criminal matters and in certain civil cases also. That High Court must therefore be considered to be the High Court mentioned in section 8 of the Legal Practitioners' Act. The applicant having been enrolled as a pleader by the High Court for the North-Western Provinces was therefore entitled by virtue of such enrolment to be enrolled and admitted to practise in all Courts of Kumaun and Garhwal in regard to all matters alluded to above, in respect of which the High Court for the North-Western Provinces had appellate jurisdiction over such Courts. The rules of Court of the 14th August, 1897, also support this view, inasmuch as by rule 2 it would appear to have been considered by the High Court at the time those rules were framed that the fact of a pleader being enrolled by the High Court would of itself entitle that pleader to practise in any Subordinate Criminal Court and in any "Revenue Office" throughout the North-Western Provinces, in which are included the Criminal and Revenue Courts of Kumaun and Garhwal. The certificate taken out by the applicant in this case was one entitling him to practise in all Subordinate Courts and in all Revenue Offices.

Mr. *A. E. Ryves* in reply

The term "High Court" in section 8 refers to the same High Court mentioned in section 6 and other sections of the Act. Wherever used "High Court" means the High Court which enrolled the legal practitioner. If read otherwise there would be the anomaly of two High Courts having concurrent jurisdiction over legal practioners in the same locality.

STANLEY, C.J., BLAIR and BURKITT, JJ.—In this matter a petition has been presented to the High Court by Pandit Padma Dat Joshi, praying that certain orders of the Commissioner of Kumaun refusing to enrol him as a pleader under section 8 of the Legal Practitioners' Act (XVIII of 1879) qualified to practise in the Courts of the Sessions Judge of Kumaun and of the Subordinate Magistrates, in all the Revenue Offices, and also in the Commissioner's Court in respect of the cases referred to in Rule (11) of the Kumaun Rules, may be set aside, and that the Commissioner of Kumaun may be directed to enrol him as such pleader, and to permit him to practise in the said Courts and Offices.

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It appears that the pleader, being duly qualified in that behalf, applied to this High Court to be admitted and enrolled as a pleader of this Court, and was duly enrolled as such on the 19th of August 1898. Subsequently he made several applications to the Commissioner of Kumaun for license to practise as a pleader in Garhwal or at Naini Tal or Almora, as also in Kumaun. These applications were refused on the ground that the Commissioner did not consider that the number of vakils and pleaders in his Division should be increased. From this refusal the petitioner appeals to this Court on the ground that the Court of the Commissioner of Kumaun is a Court of Session subordinate to this High Court, and that the petitioner having been enrolled as pleader of this Court, is entitled, by virtue of such enrolment, to be enrolled and to practise in the Court of Session of Kumaun, and in all Courts subordinate to that Court, and in all Revenue Offices in the Province of Kumaun, and that the order of the Commissioner refusing to enrol him is contrary to law.

A preliminary objection has been raised by counsel on behalf of Government and the Commissioner of Kumaun to the hearing of this application on the ground of want of jurisdiction. His contention is that the Commissioner of Kumaun is the High Court of that Province for the purposes of the Legal Practitioners' Act, and alone can make rules for the qualifications and admission of proper persons to be pleaders of that Court, and in this regard, is in no way subordinate to, and cannot be controlled in his action by, this Court. The decision of this question largely depends upon the true construction to be placed upon some of the provisions of the Scheduled Districts' Act (Act XIV of 1874), and of the rules and orders passed thereunder on the 27th of June, 1894.

The preamble to that enactment recites that various parts of British India have never been brought within, or have from time to time been removed from, the operation of the various Acts and Regulations, and the jurisdiction of the ordinary Courts of Judicature; it further recites that doubts have arisen as to what Acts and Regulations are in force in such parts, and that it is expedient to provide readier means than now exist for ascertaining the enactments in force in the territories specified in the

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first schedule to the Act. Accordingly, in the third section of the Act the Local Government, with the previous sanction of the Governor-General in Council, is empowered to declare by notification in the *Gazette* what enactments are and what enactments are not in force in any scheduled district, or any part of such districts, which notification is to be binding on all Courts of law. Then by section 5 the Local Government with the like sanction is empowered to extend by notification to any of the scheduled districts, or to any part of any such districts, any enactment which is in force in any part of British India at the date of such extension. In pursuance of the powers given by this section the Code of Criminal Procedure, the Indian Succession Act, 1885, the Indian Companies' Act, 1882, and the Indian Railways' Act, were extended to Kumaun. By section 6 of the Act the Local Government is empowered from time to time to—"*(a)* appoint officers to administer civil and criminal justice . . . . and otherwise to conduct the administration within the scheduled districts; *(b)* regulate the procedure of the officers so appointed . . . . and *(c)* direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment for the time being in force in such district shall be exercised or performed." Amongst the scheduled districts to which this Act is applicable is the Province of Kumaun and Garhwal. The High Court of the North-Western Provinces has as such High Court no inherent jurisdiction in the Provinces of Kumaun and Garhwal; any jurisdiction that it possesses in this province is derived from the Code of Criminal Procedure and from the orders of the Local Government passed in pursuance of the powers conferred by the Scheduled Districts' Act.

Under section 4*(j)* of the Code of Criminal Procedure, this High Court is the High Court in reference to proceedings in the Kumaun Division against European British subjects. The rules and orders which have been passed in pursuance of the power conferred by section 6 of the Scheduled Districts' Act and which are now in force are, as we have said, the rules and orders of the 27th of June 1894. By Rule 2 of these rules and orders this High Court is appointed the High Court for the Kumaun Division for all purposes of the Code of Criminal Procedure other than

those which it already possessed under the Code. Therefore, for all the purposes of the Code of Criminal Procedure, this Court is the High Court for the Kumaun Division. By Rule (11) it is provided that for the purpose of the Indian Succession Act, the Indian Companies' Act, 1882, and the Indian Railways' Act, 1890, this High Court shall be the High Court for the Kumaun Division. For these purposes, and for these purposes alone, has this High Court been appointed the High Court for the Kumaun Division. No further or other jurisdiction has been conferred upon it. The limited jurisdiction so conferred by the rules to which we have referred may apparently at any time be withdrawn by the Local Government, inasmuch as the Local Government is empowered from time to time to direct by what authority any jurisdiction, powers or duties incident to the operation of any enactment shall be exercised or performed. The tenure of the jurisdiction which this Court at present enjoys by virtue of these rules is therefore altogether precarious. It is what we may term extraordinary appellate jurisdiction as distinguished from the ordinary appellate jurisdiction of the Court.

We come now to sub-section (2) of Rule 11, which is an important sub-section; it provides as follows:—"Save as otherwise provided by any enactment for the time being in force, or by any notification issued in exercise of powers conferred by any such enactment, for the purposes of all other Acts for the time being in force, the Commissioner, *i.e.* of Kumaun, shall exercise the powers and perform the duties of a High Court for the Kumaun Division." This is a very wide and far-reaching rule. It confers upon the Commissioner the powers of a High Court for the purposes of all Acts other than those in respect of and for the purposes of which this Court is declared to be the High Court. Among others, it constitutes, as it seems to us, the Commissioner the High Court in his Division for the purposes of the Legal Practitioners' Act. If it had been intended by the Local Government that this Court should be the High Court for the purposes of the Legal Practitioners' Act, it would no doubt have mentioned this Act in the Rules, as it did in the case of the other enactments to which we have referred. The maxim "*expressio unius est exclusio alterius*" appears to be not inapplicable.

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We are for these reasons of opinion that the Commissioner of Kumaun is the High Court for the purposes of the Legal Practitioners' Act in the Kumaun Division. It is he who is appointed by the notification to exercise the powers and perform the duties of the High Court in respect of that Act. But then it is contended on behalf of the petitioner that by reason of the fact that this High Court has been appointed the High Court of the Kumaun Division for some purposes, the Commissioner of Kumaun and the Courts in his Divisions are subordinate to this Court within the meaning of section 8 of the Legal Practitioners' Act. This section runs as follows:—"Every pleader holding a certificate issued under section 7 may apply to be enrolled in any Court or Revenue Office mentioned therein and situate within the local limits of the appellate jurisdiction of the High Court by which he has been admitted and subject to such rules consistent with this Act as the High Court or the chief controlling Revenue Authority may from time to time make in this behalf, the presiding Judge or Officer shall enrol him accordingly, and thereupon he may appear, plead, and act in such Court or Office, and in any Court or Revenue office subordinate thereto." It is argued that the Province of Kumaun and Garhwal is within the local limits of the appellate jurisdiction of the High Court within the meaning of this section by reason of the jurisdiction which has been conferred upon this Court by the Code of Criminal Procedure, and by the Rules and Orders passed under the Scheduled Districts' Act, and that therefore the Commissioner of Kumaun was bound by law to grant the petitioner's application and to enrol him as a pleader in the Courts of his Province. We do not accede to this argument. It is clear to our minds that by virtue of Rule (11) of the Rules passed under the Scheduled Districts' Act the Commissioner of Kumaun was constituted the proper authority for making rules for the qualifications, admission, &c., of proper persons to be pleaders of his Court and of the Courts subordinate to his Court situate within the local limits of his appellate jurisdiction. It is clear to us also that he was by the same rule empowered to exercise the powers of a High Court in the admission of persons to be pleaders in his Court and in the Courts subordinate to it. He exercises in his

Province appellate jurisdiction, except in so far as such jurisdiction has been withdrawn from him by the enactments and rules to which we have referred. It cannot be said that the Province of Kumaun and Garhwal is within the local limits of the appellate jurisdiction of this High Court for all purposes. It is so for limited purposes only, and certainly, as we have already pointed out, is not so for the purposes of the Legal Practitioners' Act. The contention is based upon too wide an interpretation of the words "within the local limits of the appellate jurisdiction of the High Court" in section 8. It is argued that inasmuch as this Court exercises some appellate jurisdiction in the Kumaun Division, therefore the Courts of Kumaun are situate within the local limits of the appellate jurisdiction of this Court within the meaning of this section. It might as well, we think, be said that inasmuch as this Court is the High Court for the purposes of the Indian Divorce Act in the Province of Oudh, and is also the High Court in the same Province in the matter of references under section 57, clause *(b)*, of the Indian Stamp Act, it is therefore the High Court in that Province for the purposes of the Legal Practitioners' Act. The language of this section cannot, we think, be so widely interpreted: the words to which we have referred appear to us to be co-extensive in meaning with the same words as used in section 6, sub-section *(a)*, and to denote the local limits or area in respect of which such High Court or Court having the powers of a High Court in that behalf is empowered to make rules for the qualification, admission, and certificates of pleaders, &c., and not to extend beyond this. In other words, that the words "appellate jurisdiction" as used in the section denote the ordinary as distinguished from what we have termed the extraordinary appellate jurisdiction of this Court. If this were not so, we should have two Courts exercising the powers of a High Court in the Kumaun Division for the purposes of the Legal Practitioners' Act, namely, the Commissioner of Kumaun appointed by and acting under the rules passed by the Local Government, and this Court acting in virtue of its extraordinary appellate jurisdiction. This cannot be. For the foregoing reasons we are of opinion that this Court has no jurisdiction to entertain this application. It is therefore rejected with costs.

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April 2.

APPELLATE CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

NANDAN PRASAD (DEFENDANT) *v.* W. C. KENNEY (PLAINTIFF).*

Civil Procedure Code, sections 25, 403 *et seqq.—Transfer—Application for leave to sue* in formâ pauperis *filed in Court of Subordinate Judge—Application transferred by District Judge to his own file—District Judge not thereafter competent to send the suit back to the Subordinate Judge for trial.*

A pauper plaintiff presented to a Subordinate Judge an application for leave to sue as a pauper. This application was, by means of an order under section 25 of the Code of Civil Procedure, taken on to the file of the District Judge and heard and granted by him. *Held* that the District Judge had no power subsequently to transfer the pauper suit thus initiated back to the file of the Subordinate Judge. *Amir Begam* v. *Prahlad Das* (1) referred to.

THE respondent in this appeal presented in the Court of the Subordinate Judge of Cawnpore an application for leave to sue as a pauper, and a date was fixed for inquiry into his means. At the respondent's request this application was transferred to the Court of the District Judge. The Judge admitted the application for leave to sue *in formâ pauperis*, and having done so sent the suit back to the Court of the Subordinate Judge for trial. At the hearing before the Subordinate Judge it was objected that as the Judge had once transferred the case to his own file, he was not competent to retransfer it to that of the Subordinate Judge. This objection was, however, overruled, and a decree passed in favour of the plaintiff. The defendant appealed to the District Judge, before whom the objection as to jurisdiction was repeated. The objection was again disallowed, and the appeal was dismissed.

The defendant appealed to the High Court.

Pandit *Moti Lal Nehru*, for the appellant.

Mr. *C. Dillon*, for the respondent.

KNOX and BLAIR, JJ.—The sole plea argued before us was that the learned Judge had no jurisdiction either to retransfer the trial of this case to the Subordinate Judge, or to hear the

* Second Appeal No. 916 of 1899, from a decree of J. Sanders, Esq., District Judge of Cawnpore, dated the 9th of November, 1899, confirming a decree of Sheikh Maula Bakhsh, Officiating Subordinate Judge of Cawnpore, dated the 20th of July, 1899.

(1) Weekly Notes, 1902, p. 66.

appeal from the decree of the Subordinate Judge. It appears that one Kenney, who is respondent before us, presented an application to sue *in formâ pauperis* in the Court of the Subordinate Judge of Cawnpore. The District Judge of Cawnpore, acting under section 25 of the Code of Civil Procedure, withdrew this application and decided it himself. After deciding it, he retransferred the suit for trial to the Court of the Subordinate Judge. It is this order of transfer, and all that followed it, which is impugned by the appellant. In support of this contention the learned advocate for the appellant drew our attention to the case of *Amir Begam* v. *Prahlad Das* (1). That case is undoubtedly an authority. The only way in which the learned counsel for the respondent tried to distinguish it is, that when the application for permission to sue as a pauper was decided, the suit, which then came into existence, returned automatically—to use his own expression—to the Court which had jurisdiction to hear and determine it, *i.e.* the Court of the Subordinate Judge of Cawnpore. We see no authority for holding that there is any breach of continuity between the application to sue *in formâ pauperis* and the suit into which that application matures. According to section 410 of the Code of Civil Procedure, the application, as soon as it is granted, is deemed the plaint in the suit, and it has more than once been ruled by this Court that in such a case the plaint really dates back to the date of the application, not to the day when the application is granted and registered.

This appeal must, therefore, succeed, and we decree this appeal and set aside all proceedings which have taken place after the date on which the District Judge granted the application to sue *in formâ pauperis*. All these proceedings were without jurisdiction. The case must go back to the learned Judge, with directions to take it up from that point and to determine it according to law. The appellant will get the costs of this appeal.

Appeal decreed.

(1) Weekly Notes, 1902, p. 66.

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April 2.

Before Mr. Justice Banerji and Mr. Justice Aikman.

MAZHAR ALI KHAN (PLAINTIFF) *v.* SAJJAD HUSAIN KHAN (DEFENDANT).*

Civil Procedure Code, sections 31, 44—*Misjoinder of defendants and causes of action—Suit by transferee from heir of deceased Muhammadan against another heir and transferee from such other heir.*

A plaintiff came into Court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale-deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. *Held* that there was no misjoinder of parties or of causes of action in such a suit. *Indar Kuar* v. *Gur Prasad* (1) followed.

With reference to the objection that the claim included both movable and immovable property, and that the leave of the Court for the joinder of the two claims had not been obtained, it was *held* that section 44 of the Code of Civil Procedure did not apply to such a case. *Giyana Sambandha Pandara Sannadhi* v. *Kundasami Tambiran* (2) referred to.

THE suit out of which this appeal arose was one brought under the following circumstances to recover shares of the inheritance of a deceased Muhammadan. The property in suit, comprising both movable and immovable property, had belonged to one Munawwar Ali Khan. The plaintiff alleged that after the death of Munawwar Ali he had purchased from one of the heirs of the deceased, Abul Hasan, two and a half *sihams* out of five *sihams* by a sale deed, dated the 10th of November, 1892, and from another of the heirs, Musammat Mashiat-un-nissa, two *sihams*, by a sale deed, dated the 28th of May 1887, the latter purchase having been made *benami* for him by one Sipahi Singh. Two-thirds of the property so purchased had been sold off; and the plaintiff accordingly sought to recover three-quarters of the four and a half *sihams* dealt with by his sale deeds. The plaintiff alleged that this property was in the possession of one Sajjad Husain, another of the heirs of Munawwar Ali, who, according to the plaintiff, had withheld possession from the plaintiff's vendors and had transferred a portion of the property to other persons, who were also named as defendants.

* First Appeal No. 184 of 1899 from a decree of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 15th of July 1899.

(1) (1888) I. L. R., 11 All., 33. (2) (1886) I. L. R., 10 Mad., 375 at p. 506.

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The defendants pleaded, *inter alia*, that the suit was bad for misjoinder of parties and of causes of action, and that a necessary party, Musammat Munawwar-un-nissa one of the heirs of Munawwar Ali Khan, had not been joined. The Court of first instance (Subordinate Judge of Moradabad) accepted the defendants' objections, and, holding that the suit was bad for misjoinder of both parties and causes of action, dismissed it. The plaintiff appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Babu *Jogindro Nath Chaudhri*, Munshi *Gokul Prasad* and Pandit *Tej Bahadur Sapru*, for the respondents.

BANERJI and AIKMAN, JJ.—This is an appeal from a decree of the Subordinate Judge of Moradabad dismissing the plaintiff's suit on the ground of misjoinder of defendants and of causes of action. The property which was claimed originally belonged to one Munawwar Ali Khan. The plaintiff alleged himself to be the purchaser of the interests of Masit-un-nissa and Abdul Hasan, two of the heirs of Munawwar Ali Khan, and he claimed a portion of the shares purchased by him against Sajjad Husain Khan, another heir of Munawwar Ali Khan, who, he asserted, had withheld possession from the plaintiff's vendors, and had transferred a portion of the property to the other defendants. The plaintiff's title was acquired under two sale-deeds, one dated the 28th of May 1887, and the other dated the 10th of November, 1892. The Court below has held that the plaintiff had separate causes of action; that those causes of action had accrued separately against the different defendants; and that there was a misjoinder both of causes of action and of defendants.

In the first place, it may be observed that the Subordinate Judge is wrong in saying that the claims of different purchasers have been included in one suit. If the plaintiff's allegation be true, he is the purchaser under both the sale-deeds mentioned above, so that this is not a case of different purchasers claiming in one suit, but it is a claim made by the same person who purchased the property claimed under different sale-deeds. That is the Subordinate Judge's first mistake. In the next place, the reference to the second paragraph of section 31 of the Code of Civil Procedure in the judgment of the Lower Court overlooks the important

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words which appear in that paragraph. The paragraph runs as follows:—"Nothing in this section shall be deemed to enable a plaintiff to join in respect of distinct causes of action." The Subordinate Judge has read it as if it ran *nothing shall be deemed to enable a plaintiff to join distinct causes of action.* That that is not the intention of the paragraph is clear from the provisions of section 45, which distinctly enable a plaintiff to join in the same suit several causes of action against the same defendant or the same set of defendants. In the third place, the learned Subordinate Judge has overlooked the fact that the defendants other than Sajjad Husain derive title from and claim through that defendant, and have for that reason been made defendants to the suit. The plaintiff's action is justified by the ruling of this Court in *Inder Kuar* v. *Gur Prasad* (1). In no point of view, therefore, has there been a misjoinder either of causes of action or of parties. On the part of the respondents reference was made to section 44 of the Code of Civil Procedure, and it was urged that as in this suit the plaintiff claimed both movable and immovable property, and had done so without obtaining the leave of the Court, the suit was bad as contravening the provisions of that section. A complete answer is afforded to the objection by the ruling of the Madras High Court in *Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* (2). We may also remark that the Court below showed a want of discretion in not acceding to the prayer of the plaintiff and the principal defendants for a short adjournment to enable them to compromise the suit. The result is that we allow the appeal, set aside the decree of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure, with directions to readmit it under its original number in the register, and dispose of it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

(1) (1888) I. L. R., 11 All., 33. (2) (1886) I. L. R., 10 Mad., 375; at p. 506.

1902
April 24.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Burkitt.

SRI NATH SAHAI (DEFENDANT) *v.* RAM RATAN LAL (PLAINTIFF).*

Civil Procedure Code, section 583 *—Decree reversed on appeal after possession obtained thereunder—Application for possession and mesne profits —Disallowance of application—Separate suit for mesne profits.*

S. N. obtained a decree for foreclosure on a mortgage against *R. R.* Against this decree *R. R.* appealed to the High Court; but pending the appeal *S. N.* obtained an order absolute for foreclosure, and got possession of the mortgaged property. Subsequently the High Court set aside the order for foreclosure and modified the decree of the first Court. *R. R.* paid up the amount found by the decree of the High Court to be due by him. He then applied to the Court for restoration of possession of the mortgaged property under section 583 of the Code of Civil Procedure, and for mesne profits for the time during which he had been out of possession. His application for mesne profits was rejected, and he thereupon filed a separate suit for mesne profits.

Held that such a suit would not lie, the plaintiff not having appealed from the order refusing his app'ication for mesne profits. *Raja Singh* v. *Kooldip Singh* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the appellant.

Munshi *Gobind Prasad*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal from a decree of the Additional Subordinate Judge of Ghazipur allowing the plaintiff's claim for mesne profits.

The circumstances out of which this appeal has arisen are shortly as follows:—The plaintiff Ram Ratan Lal on the 6th of June, 1884, executed in favour of one Bindeshri Prasad a mortgage of his share in certain property to secure the principal sum of Rs. 4,000 and interest. Bindeshri Prasad subsequently, in the year 1887, transferred his interest in this mortgage to Mahadeo Dat Singh, the father of the defendant Sri Nath Sahai. On his father's death the defendant Sri Nath Sahai brought a suit on foot of his mortgage, and obtained a decree on the 21st of June, 1892. On the 12th of November, 1892, the plaintiff filed an appeal from this decree to the High Court, and whilst this

* First Appeal No. 154 of 1899 from a decree of Munshi Achal Behari, Officiating Subordinate Judge of Ghazipur, dated the 23rd June, 1899.

(1) (1894) I. L. R., 21 Calc., 989.

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appeal was pending the defendant, on the 6th of February, 1893, obtained an absolute order for foreclosure under section 87 of the Transfer of Property Act, and on the 2nd of March, 1893, obtained possession of the mortgaged property. The High Court set aside the absolute order of the 6th February, 1893, and modified the decree of the 21st of June, 1892, and the plaintiff thereupon deposited in Court the amount found to be due on foot of the mortgage, except a small sum in respect of interest, which was subsequently paid. On the 16th of February, 1895, the plaintiff applied to the Court for restoration of possession of the property under section 583, Civil Procedure Code, and also claimed mesne profits for the time during which the defendant held possession. The Subordinate Judge held that the plaintiff could not in execution proceedings recover mesne profits because the decree did not provide for mesne profits; that the proper course for the judgment-debtor was to institute a suit for mesne profits, and he dismissed the plaintiff's claim in respect of mesne profits. It is now admitted that the decision of the Subordinate Judge was wrong, and that he had power under section 583 of the Code of Civil Procedure to make an order for mesne profits. The plaintiff, however, acquiesced in the decision and instituted the present suit, with the result that by the decree of the Additional Subordinate Judge his claim has been in part allowed. Against this decree the defendant has appealed to this Court on the ground, among others, that the respondent having claimed mesne profits in his application for restitution, and the Subordinate Judge having disallowed the claim, the remedy of the respondent was an appeal against the order of the Subordinate Judge under section 244 of the Code of Civil Procedure, and that the present suit was not maintainable.

We are of opinion that the contention of the appellant is well-founded. The decree of reversal passed by the High Court on the 21st of June, 1894, carried with it the right of the defendant in the suit to restitution of all that had been taken under the erroneous decree, and authorized the lower Court to cause restitution to be made accordingly. This was so held in the case of *Raja Singh* v. *Kooldip Singh* (1), which followed other decisions to the like

(1) (1894) I. L. R., 21 Calc., 989.

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effect of the same High Court, and is not, so far as we are aware, in conflict with any ruling of this Court. It is contended, however, on the part of the respondent that, admitting that the lower Court was empowered to grant mesne profits in the execution proceedings, this fact did not preclude the plaintiff-respondent from bringing a suit to establish his claim to such profits. The answer to this contention is that, admitting that the plaintiff could have brought such suit, he did not do so in the first instance, but elected to put forward his claim to mesne profits in the execution proceedings, and when the claim was dismissed acquiesced in the dismissal of it and has not appealed. So long as the order of dismissal remains unreversed, it is a bar to any further proceeding in respect of the same claim. The matter has been decided by a Court competent to decide it, and has become in fact *res judicata*.

This, we think, furnishes a complete answer to this contention and also to the plaintiff's suit. For the foregoing reasons we are of opinion that the appeal should be allowed, and we accordingly allow it, set aside the decree of the lower Court, and dismiss the suit with costs in both Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

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April 24.

BHIM SEN (DEFENDANT) *v.* SITA RAM (PLAINTIFF).*

Suit for damages for malicious prosecution—"Malice"—"Reasonable and probable cause."

"Reasonable and probable cause" in connection with actions for damages for malicious prosecution may be defined to be an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. *Hicks* v. *Faulkner* (1) referred to.

"Malice" in a similar connection is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. *Mitchell* v. *Jenkins* (2) referred to.

The mere absence of reasonable and probable cause does not of itself justify the conclusion as a matter of law that an act is malicious. It is not

* First Appeal No. 123 of 1901 from an order of Munshi Achal Behari, Additional Subordinate Judge of Aligarh, dated the 17th July 1901.

(1) (1878) L. R., 8 Q. B. D., 167. (2) (1838) 5 B. and Ad., 595.

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identical with malice, but malice may, having regard to the circumstances of the case, be inferred from it. *Gajpathi Rau* v. *Narsing Rau Garu* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Sital Prasad Ghosh*, for the appellant.

The Hon'ble Mr. *Conlan*, for the respondent.

STANLEY, C.J. and BURKITT, J.—This is an appeal by the defendant from an order of the Additional Subordinate Judge of Aligarh, reversing the decision of the Munsif upon certain questions of fact, and remanding the case for the trial of the remaining issue in the case under section 562 of the Code of Civil Procedure. The suit was brought to recover damages for alleged malicious prosecution. It appears that the defendant Bhim Sen lodged a complaint against the plaintiff, Sita Ram, of an offence under section 215 of the Indian Penal Code, in the Court of the Magistrate of Bulandshahr, the charge being that the plaintiff stole cattle, and then restored the cattle to the owners on receipt of rewards. The complaint was heard and dismissed on the 21st of December, 1900. Thereupon, on the 21st of January, 1901, the present suit was instituted. In his plaint the plaintiff alleges that there was enmity between him and the defendant arising out of a dispute about a plot of land which was formerly under the cultivation of the father of the defendant, and was then in the possession of the plaintiff and his brothers, and that the false complaint was lodged against him in consequence of this enmity, that the charge was malicious and made without reasonable or probable cause. In his written statement the defendant denied that there was any enmity existing between him and the plaintiff, and he alleges that the charge made against the plaintiff was well-founded. The third paragraph of the written statement of the defendant runs as follows:—"The plaintiff is a cattle-thief. He receives a share in stolen cattle. The criminal case was not groundless. On the other hand, it was a *bonâ fide* case, and was instituted for public good."

In the Court of first instance (the Munsif) found that the defendant did not institute the prosecution of the plaintiff, but

(1) (1871) 6 Mad., H. C. Rep., 85.

merely laid an information of certain facts before the District Magistrate, and that the prosecution was therefore not instituted by the defendant. No attempt has been made before us to support this portion of the judgment. It is clearly erroneous. The Munsif also found that there was reasonable and probable cause for the prosecution, if there was a prosecution by the defendant, and that malice had not been proved, and accordingly he dismissed the suit. On appeal the Additional Subordinate Judge reversed the finding of the lower Court, holding upon the evidence that the defendant did prosecute the plaintiff, and that he did so maliciously and without reasonable or probable cause.

It has not been contended before us, as we have said, that the finding of the lower appellate Court that the defendant did prosecute the plaintiff is wrong. The appellant's learned pleader confined his argument to two grounds of appeal, namely, that the plaintiff did not prove, as he was bound to do, the want of reasonable and probable cause for the prosecution, and also malice on the part of the defendant. The Additional Subordinate Judge found that "there was no evidence whatever to show that the plaintiff restored to the owners the stolen cattle when they paid for them," that the allegation of the defendant that the stolen cattle had been restored to their owners by the plaintiff in his presence was absolutely false. He finds, in fact, that the charge was false, and that it was false to the knowledge of the defendant inasmuch as he purported to make it of his own personal knowledge, and not from information obtained from others, or from inferences reasonably drawn from matters which were brought under his notice. In the criminal Court the defendant, he says, admitted that he only had heard of the plaintiff's bad reputation, and that the theft of the cattle and their restoration had not taken place before him; while at the trial the defendant swore that the cattle had been restored to two persons in his presence. It is clear from his judgment that the Additional Subordinate Judge found, not merely that the charge brought against the plaintiff was a false charge, but that it was false to the knowledge of the defendant. Under these circumstances he held that there was no reasonable or probable cause for the prosecution, and from the absence of such reasonable and probable cause, he inferred malice

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on the part of the defendant. In the course of his judgment the Subordinate Judge makes use of some loose and ill-considered language, which has no doubt led to this appeal. For example, he says, that the defendant failed to prove that the charge was true. "Want of reasonable and probable cause should therefore be presumed, and malice will also be inferred from the fact that the charge was recklessly made."

Read independently of the context this statement of the law is clearly incorrect. It is not correct to say that the want of reasonable and probable cause should be presumed from the failure on the part of a defendant to prove that a charge was true. No presumption of the absence of probable cause necessarily arises from failure to prove the truth of the charge. Reading this passage, however, in connection with the earlier portion of the judgment, it becomes apparent that what the Judge intended to convey was that where a false charge is made, and such charge is false to the knowledge of the party making it, the necessary inference is that there was no reasonable or probable cause for the making of the charge. The phrase "reasonable and probable cause" has been elaborately defined in the case of *Hicks* v. *Faulkner* (1) by Hawkins, J., in the following terms:—"Now I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. There must be—(1) an honest belief of the accuser in the guilt of the accused; (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly mentioned belief must be based upon reasonable grounds; by this I mean such grounds as would lead any fairly cautious man in the defendant's situation so to believe; (4) the circumstances so believed and relied on by the accuser must be such as would amount to reasonable ground for belief in the guilt of the accused."

(1) (1878) L. R., 8 Q. B. D., 167.

The defendant in the present case could not have had any belief, much less an honest belief, in the guilt of the plaintiff, according to the finding of the lower appellate Court, for there was no foundation for the charge so soon as the allegation of the defendant that he was present when the plaintiff restored to the owners the stolen cattle was disbelieved, and his evidence was discredited. The basis of the charge was found to have, in fact, no existence, and this to the knowledge of the defendant. The Court, therefore, rightly found that there was no reasonable or probable cause for the prosecution.

Now the mere absence of reasonable and probable cause does not of itself justify the conclusion, as a matter of law, that an act is malicious. It is not identical with malice; but malice may, having regard to the circumstances of the case, be inferred from it. Whether malice should be inferred from the want of reasonable and probable cause or not, is a question which depends upon the circumstances of each case. In most cases of the kind the whole question will turn, as was said by the Madras High Court in *Gajpathi Rau* v. *Narsingh Rau Garu* (1), "on the cogency of the inference to be derived from the absence of reasonable and probable cause, the best test for which is partly abstract and partly concrete. Was it reasonable or probable cause for any discreet man? Was it so to the doer of the act? If these questions are answered in the negative, the inference of malice would appear to be irresistible." Now malice, as used in this cause of action, is not to be considered in the sense of spite or hatred, but in its wider sense as denoting any wrong or indirect motive. It can be proved by showing what the actual wrongful motive was, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some improper or indirect motive to the prosecutor. Park, J., in the well-known case of *Mitchell* v. *Jenkins* (2) thus defines it:—"The term 'malice' in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." Whether or not the motive for the prosecution which has been attributed by the plaintiff to the defendant in this case

(1) (1871) 6 Mad., H. C. Rep., 85. (2) (1833) 5 B. and A. D., 595.

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was the motive which really actuated the defendant to bring a false charge, the learned Subordinate Judge was, in our opinion, justified in the circumstances of this case in inferring malice. He says in his judgment that the charge was recklessly made, and he finds that it was made falsely and without any foundation of truth. Under these circumstances we are of opinion that there are no grounds for this appeal on the merits.

The Subordinate Judge has, however, we think improperly, remanded the case to the Court of first instance for the trial of the remaining issues in the suit. The only issue which was left undetermined by the lower Court was the question of damages. This question the Subordinate Judge should have himself decided, and not have remanded the case to the Munsif. We accordingly affirm the judgment of the lower appellate Court on the merits with costs; but while we reject the appeal on the merits, we set aside the order of remand, and direct the lower appellate Court to restore the case to its original number in the file of pending appeals, and proceed to try the issue as to the quantum of damages to which the plaintiff is entitled and give a decree accordingly. The Subordinate Judge will of course be at liberty (should he think it necessary) to remit an issue for trial under section 566 of the Code of Civil Procedure to the Court of first instance.

Appeal decreed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1902
April 30.

ISHRI *alias* HATIM ALI (DEFENDANT) *v.* MUHAMMAD HADI (PLAINTIFF).*

Act No. XV of 1877 *(Indian Limitation Act), sch. ii, arts.* 23, 24, 25, 36—*Limitation—Suit to recover damages on account of injury caused by a false report made to the Police—Suit for damages for malicious prosecution.*

The defendant laid information at a Police station against the plaintiff, alleging that the plaintiff and several other persons entered the female apartments of the defendant, broke open locks, plundered his goods, and caused hurt to his wife. Thereupon an inquiry was made by the Police, with the result that the information was found to be false. The defendant was prosecuted under section 182 of the Indian Penal Code, convicted and sentenced to six

* First Appeal No. 211 of 1899, from a decree of Lala Shankar Lal, District Judge of Mirzapur, dated the 11th September 1899.

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months' imprisonment. The plaintiff thereafter sued to recover damages from the defendant "as compensation on account of mental distress and defamation."

Held that this was not a suit for damages on account of malicious prosecution, for no prosecution had been initiated, but it was a suit for compensation for libel or slander, the limitation applicable to which was that prescribed by art. 24 or art. 25 of the second schedule to Act No. XV of 1877. *Austin* v. *Dowling* (1), *Yates* v. *The Queen* (2) and *Queen-Empress* v. *Bisheshar* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Satish Chandra Banerji* and Babu *Jiwan Chandra Mukerji*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondent.

BANERJI and AIKMAN, JJ.—This appeal arises in a suit brought by the respondent to recover from the defendant Rs. 5,000 as "compensation on account of mental distress and defamation." It appears that on the 18th of April 1898, Ori, a servant of the defendant, accompanied by the defendant, went to the Police station at Mirzapur and laid an information to the effect that the plaintiff, Muhammad Hadi, and several other persons entered the female apartments of the defendant, broke open locks, plundered his goods, and caused hurt to his wife. Thereupon an inquiry was made by the Police, with the result that the information was found to be false, and a report was sent up to that effect on the 28th of April, 1898. The defendant was prosecuted under section 182 of the Indian Penal Code, convicted and sentenced to six months' imprisonment. The present suit was instituted on the 28th of April, 1899. In answer to it the defendant raised, among other pleas, the plea of limitation, which has been repeated in the appeal before us. The first question which we have to determine, therefore, is whether the claim was within time.

The Court below has held the suit to be governed by art. 36 of the second schedule of the Indian Limitation Act, and not to be barred by limitation. That is a general article applying to all cases of torts which are not specially provided for in the other articles in the schedule, and is inapplicable if the suit

(1) (1870) L. R. 5 C. P., 534. (2) (1885) L. R. 14 Q. B. D., 648.
(3) (1893) I. L. R. 16 All., 124.

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clearly comes within some other article. The other articles which may have any bearing upon the present suit are arts. 23, 24 and 25.

Article 23 relates to suits for compensation for malicious prosecution. If the present suit is one of that description, it was within time, having been brought before the expiry of one year from the date on which the charge laid against the plaintiff was reported to be false. The learned vakil for the appellant contends that this is not a suit for malicious prosecution, and relies on *Austin* v. *Dowling* (1) and *Yates* v. *The Queen* (2). In the former of these cases Willes, J., held that there can be no malicious prosecution until the plaintiff was brought before a judicial officer. In the latter, Brett, M.R., observed that laying the information before the Magistrate would not be the commencement of the prosecution because the Magistrate might refuse to grant summons, and if no summons, how could it be said that a prosecution against anyone ever commenced? And Cotton, L. J., was of opinion that "it was not laying an information or making a charge, but the summons before the Magistrate which ought to be considered the commencement of the prosecution." Whether, having regard to the provisions of the Code of Criminal Procedure, the same rule would apply in this country, it is not necessary for the purposes of this case to decide. But we are clearly of opinion that a prosecution does not commence until proceedings are initiated by a Magistrate taking cognizance of an offence under the Code of Criminal Procedure. Part V of that Code deals with "information to the Police and their powers to investigate." Part VI provides for "proceedings in prosecutions," and Chapter XV(B), which comes under that part, is headed "conditions requisite for initiation of proceedings." The first section under that head is section 190, which declares the materials upon which a Magistrate may take cognizance of an offence. It is thus evident that the Code makes a distinction between the giving of information to the Police and the initiation of criminal proceedings. A similar distinction is made in section 211 of the Indian Penal Code between the institution of criminal proceedings and the making of a charge to the police — a

(1) (1870) L. R., 5 C. P., 534. (2) (1885) L. R., 14 Q. B. D., 648.

distinction which was recognised by this Court in *Queen-Empress* v. *Bisheshar* (1). The laying of an information before the Police cannot, therefore, be held to be the commencement of a criminal prosecution, consequently a suit for malicious prosecution does not lie unless cognizance of the offence imputed has been taken by a Magistrate. As in the present instance no action was taken by a Magistrate against the plaintiff, the suit cannot be regarded as one for compensation for malicious prosecution to which art. 23 applies. We may observe that the claim as laid in the plaint does not purport to be one for malicious prosecution.

We have next to consider whether the suit can be regarded as one for compensation for libel or slander governed by art. 24 or 25. The report to the Police, of which the plaintiff complains, contains an imputation of the offence of dacoity, and is thus defamatory of the plaintiff's character. It was therefore a libel or a slander, and it was not the less so because the words constituting the libel or slander were written or spoken to a Police officer. It was a libel if the imputation was made in writing, and a slander if made orally. The gist of the libel or slander was the imputation of a criminal offence. The Police officer to whom the report was made held, it is true, an inquiry as to the truth of the complaint, but that did not alter the nature of the defendant's act which has given the plaintiff his cause of action. The investigation by the Police was a matter which might be taken into consideration as aggravating damages. The defendant did not give the plaintiff into custody or ask the Police to search his house, or hold an inquiry. All he did was to give information of the alleged offence, and he left it to the Police officer to take such action as he might think proper. We are therefore unable to agree with the learned Subordinate Judge that the case is not one of libel or slander. And we are of opinion that the article governing it is either art. No. 24 or No. 25. The date from which limitation began to run was the date on which the alleged libel was published or the slanderous words, which in this case were in themselves actionable, were spoken, that is, the 18th of April, 1898, the date of the report

(1) (1893) I. L. R., 16 All., 124.

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to the Police. As the suit was instituted on the 28th of April, 1899, it was beyond time and should have been dismissed. We allow the appeal, set aside the decree of the Court below, and dismiss the suit with costs here and in the Court below.

Appeal decreed.

FULL BENCH.

1902
March 14.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Banerji.

REFERENCE UNDER SECTION 57 OF ACT No. II OF 1899.*

Act No. II of 1899 *(Indian Stamp Act), sch. i., Arts.* 23, 55, 62*(e)—Stamp —Conveyance — Release — Document executed by a* benami *purchaser professing to relinquish in favour of the real purchaser any claims which he might have in virtue of the purchase.*

Held, that a document by means of which the certified purchaser of property sold by auction in execution of a decree purported to relinquish in favour of a person whom he alleged to be the real purchaser of the property, any claims which he might have in respect of the property by reason of his being the certified purchaser thereof was to be stamped as a release according to article 55 of the first schedule to the Indian Stamp Act, 1899.

THIS was a reference made under section 57 of Act No. II of 1899 by the Board of Revenue under the following circumstances:—

A bond was executed in favour of one Reoti Saran. On that bond he sued and obtained a decree. In execution of that decree certain property was sold; and Babu Reoti Saran, the decree-holder, became the certified purchaser. Babu Reoti Saran subsequently executed a document, in which he recited that throughout these transactions the real owner of the decree and the real purchaser of the property was his brother, Raghubir Saran. In this document the executant stated:—"Actually Babu Raghubir Saran is the owner of all the property, and he is the proper man entitled to obtain possession, and to get his name recorded in the revenue records. I have no right or concern of whatever kind with the said property, nor shall I have anything to do with the same: wherefore this agreement is given by way of release that it may be of use." The question having arisen as to whether this document was a conveyance or a release, or any

* Miscellaneous No. 148 of 1901.

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other kind of instrument liable to duty under the Stamp Act, this question was referred by the Commissioner of Stamps to the Board of Revenue, and by the Board of Revenue to the High Court.

Mr. *A. E. Ryves*, on behalf of the Board of Revenue :—

It is suggested that the effect of the execution of this document by Reoti Saran is to convey his rights under the purchase and sale certificate to Raghubir Saran; and that therefore it should have been stamped as a "conveyance." But the document cannot operate as a transfer. It does not even purport to give Raghubir Saran any rights: all it does is to recite that the purchase was *ism farzi* and that the real purchaser was Raghubir Saran. It expressly recites that Reoti Saran has no rights in the property: it cannot therefore, and indeed does not, convey any rights. On the other hand the person who has purchased land at an auction sale and obtained a "sale certificate" has thereby acquired a good title to the land included in the certificate, and is entitled on the strength of it to go to the Revenue Court and obtain mutation of names in his favour and be put in actual possession of the land. This document, if it has any force, would then be included in the term "release"* because Reoti Saran gives up his right to complete his possession of the land. In this view the document should be stamped as a release.

KNOX, BLAIR, and BANERJI, JJ.—The question referred to us is whether a certain document which is upon the record is a release or a conveyance, or whether it is any other kind of document liable to stamp duty, such as a transfer under schedule i, article 62, clause *(e)* of the Act.

The document is one in which one Babu Reoti Saran, a certified purchaser of property sold in execution of a decree, recites that the real owner of the decree, and the real purchaser of the property from first to last and throughout, has been his brother, Babu Raghubir Saran. The executant adds that the document, which he calls an agreement, is given by way of release that it may be of use.

* In Act No. II of 1899, schedule I, article 55 the term "release" is thus defined:—"Any instrument whereby a person renounces a claim upon another person or against any specified property."

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The term "conveyance" has been defined in Act No. II of 1899. Looking to the document as it stands, it cannot be said that it is an instrument by which property is transferred *inter vivos*. The writer says that he has nothing to transfer, and he does not pretend to transfer anything. On the other hand, we find upon turning to schedule i, clause 55, that a release which is liable to stamp duty is set out as being an instrument whereby a person renounces a claim upon another person or against any specified property. If this document is to be of use in any way, it may be said it is a document whereby Babu Reoti Saran renounces all claims he may have, or be supposed to have, against the property of which he is recorded as certified purchaser.

The question is not free from difficulty, as the Board of Revenue point out. Looking to the curious way in which both the term "instrument" and the word "release" are defined and explained in the Act, we hold that the document is a release on which stamp duty should be paid.

This is our answer to the reference.

1902
March 14.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Banerji.

REFERENCE UNDER SECTION 57 OF ACT No. II OF 1899.*

Act No. II of 1899 *(Indian Stamp Act), sections 35(b) and 42—Stamp—Penalty—Unstamped receipt.*

In applying proviso *(b)* of section 35 of Act No. II of 1899 the Court should not levy the duty of one anna as well as the penalty of one rupee, and when a receipt is admitted in evidence under the proviso above referred to, it is not necessary that the receipt should be endorsed in the manner provided for in section 42.

THIS was a reference made by the Board of Revenue under section 5 of Act No. II of 1899 at the instance of the Commissioner of Stamps. It appears that it was the practice of some Courts in dealing with receipts under section 35*(b)* of Act No. II of 1899 to require the duty of one anna to be paid in addition to the penalty of one rupee prescribed by the section, and also to endorse the receipts thus dealt with in the manner laid down in section 42. It appearing doubtful whether this procedure was correct, the following questions were formulated for the opinion of the High Court:—"(1) In applying proviso *(b)* to section 35 of

* Miscellaneous No. 172 of 1901.

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REFERENCE UNDER SECTION 57 OF ACT No. II OF 1899.

Act No. II of 1899, should the Court levy the duty of one anna as well as the penalty of one rupee? (2) When a receipt is admitted under the proviso, should it be endorsed as required by section 42?"

Mr. *A. E. Ryves* on behalf of the Board of Revenue:—

Under the old Stamp Act a document which required to be stamped with a one anna stamp to be "duly stamped" could under no circumstances be received in evidence unless it had been "duly stamped" when executed. Under Act No. II of 1899, however, section 35*(b)* provides that "where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it." In the present case A tendered in evidence against B a receipt, which ought to have been, but was not, stamped by having affixed to it a one anna receipt stamp. The Court directed that the receipt be stamped with a one anna stamp and that a penalty of one rupee should be paid under section 35*(b)*. On payment of the duty and penalty the Court, purporting to act under section 42, endorsed a certificate on the back of the receipt in terms of section 42(1). Two questions arise—(1) whether the duty of one anna should have been levied as well as the penalty? and if this is answered in the negative, then (2) whether section 42 applies. It is argued that as to (1) no duty is chargeable: the penalty only can be levied; and the effect of that is to make the receipt admissible in evidence, not generally, but only as against the particular person specified in the schedule. If the duty was levied as well as the penalty, there would be no reason why the receipt should not be admissible in evidence for all purposes; but this would be directly opposed to the intention of the Legislature. Not one receipt in a thousand perhaps is ever produced in Court, and if the omission to stamp a receipt could be subsequently completely cured for all purposes by payment of the duty and penalty, it would not be worth while to stamp a receipt, and great loss would be caused to the revenue. As to (2), section 42 only applies where duty is levied as well as a penalty. In the case

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of a receipt requiring a one anna stamp, the duty is not leviable, consequently section 42 has no application, and the Court is not justified in acting under clause (1) of section 42.

The following opinion was pronounced:—

KNOX, BLAIR, and BANERJI, JJ.—The questions which are referred to us are (1) whether, in applying the proviso *(b)* of section 35 of Act No. II of 1899, the Court should or should not levy the duty of one anna as well as the penalty of one rupee; and (2) when a receipt is admitted under the proviso, whether it should or should not be endorsed as required by section 42.

Our answers to both the questions are in the negative.

1902
April 7.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DUNGAR MAL AND OTHERS (OPPOSITE PARTIES) *v.* JAI RAM (PETITIONER).*

Civil Procedure Code, section 211—*Mesne profits—Allowance of expenses of collection of rents to a trespasser against whom a decree for mesne profits has been passed—Principle upon which such expenses should be allowed or disallowed.*

In estimating the mesne profits which the owner of land is entitled to recover from a trespasser the costs of collecting rents, which are ordinarily incurred by the owner, should be allowed to the trespasser only where such trespasser entered on the land in the exercise of a *bonâ fide* claim of right. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bonâ fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. *Altaf Ali* v. *Lalji Mal* (1) followed. *McArthur* v. *Cornwall* (2), *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (3) referred to. *Abdul Ghafur* v. *Raja Ram* (4) distinguished.

In the suit out of which this appeal arose the plaintiff claimed possession as the adopted son of one Tika Ram of lands which

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* First Appeal No. 19 of 1901 from an order of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 3rd of December, 1900.

(1) (1887) I. L. R., 1 All., 518.
(2) (1892) L. R., 1892 A. C., 75.
(3) (1900) L. R., 27 I. A., 110.
(4) (1901) I. L. R., 23 All., 252.

had been the property of Tika Ram. Of these lands the defendants, notwithstanding that they knew the plaintiff to be the adopted son of Tika Ram, had forcibly dispossessed the plaintiff, and they further, acting in collusion with other parties, set up a forged will purporting to have been executed by Tika Ram, the effect of which, if genuine, would have been to defeat the claim of the plaintiff. The plaintiff obtained a decree for possession and mesne profits. On the plaintiff's applying for execution of his decree for mesne profits the defendants pleaded in reduction of the amount claimed that they were entitled to set off the expenses incurred by them in the collection of rents during the time that they were in possession. The Court executing the decree (Additional Subordinate Judge of Moradabad) referring to the cases of *Sharaf-ud-din* v. *Fatehyab Khan* (1) and *Abdul Ghafur* v. *Raja Ram* (2), disallowed the defendants' contention and passed an order fixing the amount of the mesne profits payable by the defendants. Against this order the defendants appealed to the High Court raising the same plea as to the non-allowance of collection expenses.

Pandit *Sundar Lal* (for whom Munshi *Gokul Prasad*), for the appellants.

Mr. *A. E. Ryves*, for the respondent.

STANLEY, C.J. and BURKITT, J.—The suit in this case was instituted by the plaintiff to recover possession of lands of which he had been wrongfully dispossessed by the defendants, and also for mesne profits. A decree was passed in favour of the plaintiff, and mesne profits have been awarded. In estimating the amount of mesne profits the defendants claimed to be entitled to credit for collection charges. This the learned Subordinate Judge disallowed on the ground that the defendants under the circumstances were not entitled to set off the alleged collection charges against any portion of the plaintiff's claim. An appeal has been accordingly taken against the decree in so far as it disallowed to the defendants the costs of collection. The facts of the case disclosed before us show that the conduct of the defendants in dispossessing the plaintiff of his property was very wanton and malicious. It appears that the property belonged to one Tika Ram deceased

(1) Weekly Notes, 1898, p. 23. (2) (1901) I. L. R., 23 All., 252.

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and that he had adopted the plaintiff as his son. This fact was known to the defendants, but notwithstanding it they forcibly took possession of all the property of Tika Ram, and not content with this, they also, acting in collusion with other parties, set up a forged will purporting to have been executed by Tika Ram, the effect of which, if genuine, would have been to defeat the claim of the plaintiff. Under such circumstances the trespass of the defendants was of a very aggravated character, and it appears to us that if, in any case, the Court is entitled to disallow collection expenses to a trespasser, this is such a case. Reliance has been placed by the appellant's pleader upon a decision of their Lordships of the Privy Council in the case of *McArthur & Co.* v. *Cornwall* (1). According to the head-note to that case, it would appear to have been held that the measure of damages in every case such as the present is "the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management, and that, however wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses, or the infliction of a penalty on the defendants beyond the loss sustained by the plaintiff." On reading the judgment of Lord Hobhouse, who delivered the judgment of their Lordships, it seems to us that the head-note to that case is expressed in too wide language, for his Lordship appears from the judgment to have confined his observations to the case before him, and not to have laid down a general principle which would be applicable to all cases. His Lordship says (at page 88) :—" Assuming in Cornwall's *(i.e.* the plaintiff's) favour that such conduct *(i.e.* the conduct of the defendants) would authorize what is in its nature a fine or penalty, and is not damage to the plaintiff by reason either of pecuniary loss or of such loss combined with injury to the feelings (a proposition which appears to their Lordships open to grave question), their Lordships *cannot take so severe a view of the conduct of the defendants.*" Then the judgment goes on to show that the conduct of the defendants was not misconduct of an aggravated character, and proceeds thus:—"To say,

(1) (1892) L. R., 1892 A. C., 751.

however, that for such a piece of disobedience to the law, they (the defendants) shall be disentitled to charge their expenses on the land against their receipts from it and shall be fined into the bargain, and all for the benefit of Cornwall, is going beyond the point warranted by any principle or any decided case known to their Lordships." In that case, we may observe, the plaintiff had been guilty of grave misconduct; for example, after incurring liability to the defendants he had mortgaged his property fraudulently, he had also executed a fraudulent conveyance, and then directly a judgment was obtained against him by the defendants, had left the island where the property was situate in breach of a pledge made to the defendants, leaving his labourers to shift for themselves, and the defendants to recover their debt as best they could. The defendants then, no doubt wrongfully, took possession of the property, but, as their Lordships held, this was not under the circumstances a very serious infraction of the law. Another case which has been strongly relied upon by the learned pleader for the appellant is the case of *Abdul Ghafur* v. *Raja Ram* (1). This was a Letters Patent appeal from the decision of Mr. Justice Knox, who had, under the circumstances of that case, disallowed collection charges. The learned Chief Justice, Sir Arthur Strachey, disagreed with the decision of Mr. Justice Knox, holding upon the facts that the justice of the case did not require that the appellant should be deprived of the expenses of collection, and that the mesne profits should not include anything more than the actual profits received from the land after deducting the collection charges. In this case the learned Chief Justice relied upon the decision of their Lordships of the Privy Council in the case to which we have referred, but treated it apparently as only laying down the principle that unless justice demand otherwise, collection charges should ordinarily be given. He observes that it is only when the trespass is of a very aggravated character that the Court, in the exercise of its discretion, may refuse such charges. Now that Lord Hobhouse, in the case to which we have referred, did not intend to lay down a rule that collection expenses should be allowed in every case, appears to us

(1) (1901) I. L. R., 23 All., 252.

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to be apparent from his judgment in the case of *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1), in the course of which, at page 124, he observes that "mesne profits are in the nature of damages which the Court may mould according to the justice of the case."

In the case of *Altaf Ali* v. *Lalji Mal* (2), it was held by the majority of a Full Bench of this Court that in estimating the mesne profits which the owner of the land is entitled to recover from a trespasser the costs of collecting rents which are ordinarily incurred by the owner should be allowed to the trespasser only when such trespasser entered on the land in the exercise of a *bonâ fide* claim of right. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bonâ fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. We are prepared to accept this statement of the law, which has been followed and acted on in this Court. In the case before us, as we have said, the trespass was of a very aggravated and malicious character, and was such as, in our opinion, disentitled the appellant to favourable consideration from the Court. We therefore disallow his appeal with costs.

The respondent has filed an objection to the decree on the ground that a sum of Rs. 200 has through an error in addition been disallowed. It is admitted by the pleader for the appellant that a sum of Rs. 154 was allowed instead of the sum of Rs. 354. This error will, therefore, be corrected, and the sum of Rs. 354 will be allowed instead of Rs. 154, that is, the amount of the decree will be increased by Rs. 200.

Appeal dismissed and objection allowed.

(1) (1900) L. R., 27 I. A., 110. (2) (1887) I. L. R., 1 All., 518.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1902
April 8.

WAJIH-UD-DIN (DEFENDANT) *v.* WALIULLAH (PLAINTIFF) AND KUDRAT-UL-LAH AND OTHERS (DEFENDANTS).*

Act No. XII of 1887 *(Bengal Civil Courts Act), section 24—Act No. I of* 1887 *(General Clauses Act), section* 3, *clause* (13)*—Valuation of suit —Appeal—Suit for partition.*

In a suit for partition of the share of one only out of several co-sharers in immovable property, the proper valuation of the suit for purposes of jurisdiction is the value of the share sought to be separated from rest of the property, and not the value of the entire property out of which the share is to be taken.

In the suit out of which this appeal arose, the plaintiff as a member of a Muhammadan family claimed partition of his share of certain property which he alleged to be the joint property of the family. The relief asked for by the plaintiff in his plaint, was thus stated :—"That according to the *sihams* mentioned in paragraph 6 of the plaint the under-mentioned property may be caused to be partitioned by preparation of lots, and the *sihams* of each party being separated, the plaintiff may be put in separate possession of his lot." In the plaint, the entire property was valued at Rs. 7,082, and the share of the plaintiff at Rs. 2,178. The Court of first instance (Subordinate Judge of Agra) passed a decree directing partition of the plaintiff's share in the family property and declaring the shares to which the other members of the family were entitled. Against this decree one of the defendants, Wajih-ud-din, appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the appellant.

Mr. *D. N. Banerji* and Maulvi *Ghulam Mujtaba*, for the respondent.

BANERJI and AIKMAN, JJ.—A preliminary objection has been taken to the hearing of this appeal on behalf of the respondent to the effect that an appeal from the decree of the Court below lay, not to this Court, but to the Court of the District Judge. In our opinion this objection must prevail. Under section 21 of Act No. XII of 1887 an appeal from the decree of a Subordinate Judge lies to the High Court, where the value of

* First Appeal No. 129 of 1899 from a decree of Munshi Rajnath Prasad, Subordinate Judge of Agra, dated the 25th of April, 1899.

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the suit exceeds Rs. 5,000. Where it does not exceed that amount the appeal lies to the District Judge. Under the General Clauses Act No. I of 1887, section 3, clause (13), value with reference to a suit means the amount or value of the subject-matter of the suit. Now the question is, what was the value of the subject-matter of the present suit? The suit was one for partition of what the plaintiff claimed to be his share in the property of a deceased Muhammadan. He valued his share at Rs. 2,178. The value of the whole property exceeded Rs. 5,000. It is contended on behalf of the appellant that the value of the whole property must be deemed to be the value of the subject-matter of the suit. We do not think so. What the plaintiff claimed was that his own share should be partitioned, and that he should be put into separate possession of it. No doubt he stated in the plaint that the partition should be made by the preparation of lots and separation of the shares of each party. The separation of the shares of parties other than the plaintiff himself was only ancillary to the partition of the plaintiff's share. The claim as framed does not necessarily mean partition *inter se* among the defendants. That was a matter with which the plaintiff had no concern. This suit cannot, therefore, be regarded as a suit in which the plaintiff asked the Court to make a partition, not only of the share of the plaintiff himself, but of the shares of the defendants *inter se*. In that view it is not necessary for us to decide whether, if the suit had been of the description last mentioned, the value of the whole property would be the value of the subject-matter of the suit. In the present instance we hold that the subject-matter of the suit is the plaintiff's share, and that alone. The value of that share being below Rs. 5,000 no appeal lay to this Court. We allow the preliminary objection, and direct that the memorandum of appeal be returned for presentation to the proper Court. The respondents will get their costs incurred in this Court.

Appeal dismissed.

1902
April 4.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Burkitt and Mr. Justice Aikman.

BHURA MAL AND OTHERS (DEFENDANTS) *v.* HAR KISHAN DAS AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, sections 108, 443– *Guardian* ad litem—*Minor defendant not properly represented*—Ex parte *decree against minor—Application to set aside decree—How far the granting of such application should affect parties other than the applicant.*

A suit claiming payment of money alleged by the plaintiffs to be due one balance of account was filed against three defendants, *viz.* Bhura Mal, Musammat Gayatri, the daughter-in-law, and Jamna Das, the son of Bhura Mal. The second and third defendants being minors, Bhura Mal was named as their guardian, and a notice was issued to him under Rule 128 of the Rules of Court, calling upon him to state whether he was willing to act as guardian *ad litem* to the minor defendants; Bhura Mal was also duly served with a summons in the suit. Bhura Mal entered no appearance, but the Court nevertheless, though no order had been made appointing any one as guardian *ad litem* for the minors, fixed a date for the hearing of the suit. Upon that date none of the defendants appeared, and the Court passed an *ex parte* decree against all three. On execution of this decree being taken out by the plaintiffs, applications were made on behalf of the minor defendants under section 108 of the Code of Civil Procedure to set aside the decree.

Held by the Full Bench, that there having been no appointment of Bhura Mal as guardian *ad litem* of the minor defendants in the manner prescribed by section 443 of the Code of Civil Procedure (mere notice to Bhura Mal of the proposal to appoint him being quite insufficient), the minors were entitled to have the decree set aside as against them. *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (1) and *Kesho Pershad* v. *Hirday Narain* (2) referred to by Aikman, J.

On the question whether the decree should be set aside as regards Bhura Mal also, it was *held* by Stanley, C.J., that where an order is made under section 108 of the Code of Civil Procedure, the decree set aside is primarily the whole decree and the suit to be proceeded with is the whole suit; though where a decree passed against several defendants consists in reality of separate decrees against each, it may be that the decree can be set aside in part. When a decree is one and indivisible it must be set aside in its entirety. *Mahomed Hamidulla* v. *Tohurennissa Bibi* (3) and *Ajodhya Pershad Singh* v. *Sheo Pershad Sahu* (4) referred to; *Manaku Kom Pedru* v. *Sitaram Aimaram Vagh* (5) not followed.

Per BURKITT, J.—On the facts of the particular case the *ex parte* decree ought to be set aside as against all the defendants.

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* First Appeal No. 98 of 1901 from an order of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 22nd July, 1901.

(1) (1886) I. L. R., 14 Calc., 204.
(2) (1876) 6 C. L. R., 69.
(3) (1897) I. L. R., 25 Calc., 155.
(4) (1900) 5 C. W. N., 58.
(5) (1893) I. L. R., 18 Bom., 142.

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Per AIKMAN, J.—Section 108 of the Code of Civil Procedure primarily applies so far only as the particular defendant, who seeks to get an *ex parte* decree against him set aside, is concerned. *Huro Krishno Doss* v. *Motee Chand Baboo* (1) referred to. Though under certain circumstances it may be necessary in the interests of justice that the whole decree should be reopened. Thus when the decree is one and indivisible it must be set aside as a whole or not at all, although the application to set aside the decree may be the application of only one of the defendants. *Dookhee Khan* v. *Rajessuree Ranee* (2) and *Monomohini Chowdhurani* v. *Nara Narayan Roy Chaudhri* (3) referred to.

The following cases were also considered in the judgment of Aikman, J.—*Doorga Persaud Ghose* v. *Greeshchunder Bose* (4), *Brojonath Surmah Chuckerbatty* v. *Anund Moyee Debia Chowdhrain* (5), *Manaku kom Pedru* v. *Sitaram Atmaram Vagh* (6), *Mahomed Hamidulla* v. *Tohurennissa Bibi* (7).

IN this case the plaintiff brought a suit for money alleged to be due to them on a balance of accounts against three defendants, namely, Bhura Mal, his daughter-in-law Musammat Gayatri the widow of his deceased son Ganga Prasad, and his son, Jamna Das. Bhura Mal was duly served with a summons in the suit; and Musammat Gayatri and Jamna Das being minors, a notice under the provisions of Rule 128 of the Rules of Court was also served upon Bhura Mal calling upon him to state whether he was willing to act as guardian *ad litem* for the minor defendants. To this notice Bhura Mal paid no attention, and no order was made by the Court appointing him or any other person to be guardian *ad litem* as required by section 443 of the Code of Civil Procedure. The Court nevertheless proceeded to fix a date for the hearing of the suit. On that date there was no appearance for any of the defendants, and an *ex parte* decree was thereupon passed against all the defendants for the amount alleged by the plaintiffs to be due. Proceedings were taken to execute the decree, and then for the first time the minor defendants became aware that a suit had been instituted and a decree passed against them. An application was made by the defendants, in the case of Musammat Gayatri through one Radha Ballabh, and in the case of Jamna Das through Bhura Mal, to have the *ex parte* decree set aside. The Court of first

(1) (1867) 8 W. R. C. R., 260.
(2) (1871) 15 W. R. C. R., 371.
(3) (1899) 4 C. W. N., 456.
(4) (1864) 1 W. R. C. R., 222.
(5) (1867) 7 W. R. C. R., 237.
(6) (1893) I. L. R., 18 Bom., 142.
(7) (1897) I. L. R., 25 Calc., 155.

instance (Subordinate Judge of Aligarh) dismissed the application, apparently holding that Bhura Mal was the duly appointed guardian of the minor defendants for the purposes of the suit inasmuch as he had been served with a notice calling upon him to state whether he was willing to act as such guardian and had not declined to act. Against this order the defendants appealed to the High Court.

Pandit *Moti Lal Nehru* and Pandit *Madan Mohan Malaviya*, for the appellants.

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal*, Babu *Ratan Chand* and Maulvi *Rahmat-ullah*, for the respondents.

STANLEY, C.J. — This is an appeal from an order of the Subordinate Judge of Aligarh refusing the application of the appellants under section 108 of the Code of Civil Procedure to set aside an *ex parte* decree which was passed against them on the 14th of June, 1900. The suit was brought by the plaintiffs for money alleged to be due to them on a balance of accounts. The defendants are one Bhura Mal, his daughter-in-law Musammat Gayatri, the widow of Ganga Prasad, a deceased son of Bhura Mal, who is a minor, and Jamna Das, the minor son of Bhura Mal. Bhura Mal was admittedly duly served with summons in the suit, and also, as has been proved, with a notice under the provisions of rule 128 of the Court's Rules calling upon him to state whether he was willing to act as guardian *ad litem* for the minor defendants. It appears that he paid no attention to this notice, and that the Court omitted to pass any order appointing him or any other person to be such guardian, as required by section 443 of the Civil Procedure Code. Without passing any order, either formal or informal, appointing any such guardian, the Court fixed the 14th of June, 1900, for the hearing. On that date there was no appearance for any of the defendants, and an *ex parte* decree was thereupon passed against all the defendants for the amount alleged by the plaintiffs to be due. Proceedings were taken to execute the decree, and then, for the first time, the minor defendants became aware that a suit had been instituted and a decree passed against them. An application was made by the defendants, in the case of Musammat Gayatri through one Radha Ballabh, and in the case of Jumna

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Das through Bhura Mal, to have the *ex parte* decree set aside. The Subordinate Judge refused the application, apparently holding that Bhura Mal was the only appointed guardian *ad litem* of the minor defendants for the purposes of the suit, inasmuch as he had been served with a notice calling upon him to state whether he was willing to act as such guardian and had not declined to act. Where a defendant to a suit is a minor, the Court is bound, under the provisions of section 443 of the Code, on being satisfied of the fact of such minority, to appoint a proper person to be guardian for the purposes of the suit for such minor, to put in the defence for him, and generally to act on his behalf in the conduct of the case. In the appointment of a guardian the Court ought to be satisfied, not merely that the proposed guardian is a fit and proper person to act as such, but also that he has no interest directly or indirectly adverse to the minor. An active duty in this respect is thus imposed on the Court. It is said that the fact that Bhura Mal did not object to his being appointed guardian when this notice calling upon him to state whether he was willing to act as such was served upon him, was equivalent to a consent on his part to act, and justified the Court in regarding him as guardian. But the question is not whether the proposed guardian was willing to act, but whether the Court was satisfied upon proper materials that he was a proper person to appoint, and being so satisfied, did appoint him within the meaning of section 443. It is clear to my mind that the Court did not, either formally or informally, appoint Bhura Mal guardian *ad litem* of either of the minor defendants, and consequently that the case must be dealt with as if no guardian *ad litem* had been appointed for them. A Court cannot be too jealous in observing the requirements of the law in regard to infants, and in seeing that in suits affecting them their interests are properly safeguarded. It is unfortunate that in this instance the Court entirely disregarded the requirements of the section to which I have referred, and, neglectful of the obvious and simple duty thereby enjoined upon it, passed a decree against the minor defendants. I may observe that Musammat Gayatri is the widow of a deceased son of Bhura Mal, and could not as such have been under any liability to the plaintiffs in respect of the alleged debt. For these reasons the

decree clearly must, I think, be set aside as against the minor defendants.

A more difficult question, however, remains for determination, and that is, whether our order should be limited to setting aside the decree as against the minors merely, or should go further and set it aside in its entirety as well against Bhura Mal as against the minor defendants. This question depends upon the true construction to be placed upon section 108 of the Code of Civil Procedure. This section runs as follows :—"In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside, and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit." It has been contended on behalf of the respondents that the direction given in the section, namely, that the Court shall set aside the decree, does not mean that the Court shall set aside the decree in its entirety against all the defendants, but only as against a party who may not have been duly served, or a party who was prevented by any sufficient cause from appearing when the suit was called on for hearing. If this had been the intention of the Legislature the addition of a few words to the section would have made the intention perfectly plain : the insertion after the words "the decree" in the latter portion of the section of some such words as "as against such defendants" would have rendered the meaning plain, and I cannot but think that words such as these would have been introduced if such had been the intention. Again, at the end of the section the Court is directed, after passing an order to set aside the decree, to appoint a day for proceeding with *the suit*. Here again there is an indication that it was the entire decree which was in the contemplation of the Legislature, and not the decree so far as it affected one or more only of the defendants, for the direction is to *proceed with the suit*, not to proceed with the suit as against the defendant who had succeeded in having the decree set aside. It is a well-known rule of

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construction that nothing is to be added to, or taken from, a statute unless adequate grounds are found, either in the cause of the enactment, or in the context, or in the consequences which would result from the literal interpretation, to justify the inference that the Legislature intended something which it had omitted to express. I am not aware that there are any such grounds in the present case. On the contrary, it seems to me that expediency requires that the entire decree shall be set aside. Serious complications might arise if the decree were allowed to stand as against one defendant, and yet be set aside as against co-defendants. For example, in a suit for a declaration that a plaintiff is entitled to joint possession of immovable property with two defendants *A* and *B*, *A* is served with the summons and *B* is not served. Neither defendant appears to defend the suit, and a decree is passed against both defendants. *B* makes an application to the Court to have the decree set aside, and it is set aside accordingly as against him, but not as against his co-defendant. Upon the hearing *B* establishes that the plaintiff has no title whatever to the property. There would in such a case be two absolutely inconsistent decrees: which is to prevail? Again, let me take the case of a promissory note made by two persons *A* and *B* jointly; *B* has paid the amount of the note; notwithstanding this the payee sues both parties on the note. A alone is served with summons, but does not appear to defend the action. *B* has not been served with summons, and in consequence has the decree set aside as against him, and on the trial of the suit establishes the fact of payment. In such a case *A* would be liable under the decree obtained against him to satisfy a note which the Court found had already been satisfied by *B*. Other instances of like anomalies might readily be multiplied. There does not appear to be any authority upon this question in this Court; but it has recently come up for decision in several cases in the Calcutta High Court. In the case of *Mahomed Hamidulla* v. *Tohurennissa Bibi* (1) it was held that the words "the decree" in section 108 of the Code mean the *whole decree in the suit*. In that case a suit had been brought against two sets of defendants upon a promissory note which had been made by two persons, one of

(1) (1897) I. L. R., 25 Calc., 155.

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whom died before the suit was brought. The suit was brought against the surviving maker of the note, and the heirs of the other deceased maker. Two of these heirs were *parda-nashin* ladies, upon whom summons had not been duly served. A decree was passed against all. The defendants against whom the decree had been made *ex parte* applied to the Munsif of Alipore under section 108 of the Code to have the decree set aside, and it was set aside as against all the defendants. At the instance of the plaintiff, a rule was granted to show cause why the order of the Munsif should not be set aside, which was heard before Maclean, C.J. and Banerji, J. These learned Judges held that upon the true construction of section 108 of the Code, the order of the Munsif was correct, setting aside the decree *in its entirety*. This is a stronger case than the case before us, inasmuch as in it some of the defendants appeared and defended the suit, whereas in this case before us none of the defendants defended the suit. The ruling in this case was followed by another Bench of the Calcutta High Court in the case of *Ajodhya Pershad Singh* v. *Sheo Pershad Sahu* (1). In that case a suit was brought to enforce a mortgage against three persons, one of whom was a minor, and represented by his father-in-law as guardian. None of the defendants appeared, and the suit was decreed *ex parte*. An order was subsequently made making the decree absolute, and in execution of the decree the property was sold. The minor defendant, represented by one Fateh Bahadur as next friend, made an application to have the *ex parte* decree set aside under section 108 of the Code, and a similar application was made by one of the other defendants. The Subordinate Judge of Muzaffarpur, without taking any evidence, was of opinion that, so far as the minor was concerned, the non-appearance in the suit of the guardian was sufficient cause within the meaning of section 108, and that the *ex parte* decree ought to be set aside, and that the decree being set aside against the minor defendant it should be set aside against the other defendants. Against this order the plaintiff made an application and obtained a rule to show cause why the order of the Subordinate Judge should not be set aside. The learned Judges, Ghose and Steven, JJ.,

(1) (1900) 5 C. W. N., 58.

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concurred in the decision in *Mahomed Hamidulla* v. *Tohurennissa Bibi*, to which I have referred, and held that the decree was properly set aside by the Subordinate Judge as against all the defendants. There appears to me to be great weight in the reasons assigned for their judgment by the learned Chief Justice, Sir Francis Maclean, and Mr. Justice Banerji, in the case which I have quoted, but it is not necessary for me, and I therefore abstain from expresing any opinion upon a case, such as the case before them, in which one or more of several co-defendants has appeared and defended the suit, while in the case of another defendant a decree has been passed *ex parte*. A conflicting decision upon this point is to be found in the case of *Manaku kom Pedru* v. *Sitaram Atmaram Vagh* (1), in which Sir Charles Sargent and Bayley, J., held that the setting aside of an *ex parte* decree on an application by a co-defendant against whom it had been passed *ex parte* did not reopen the case against the defendants who were present and who conducted the defence where there is a common cause of action against all the defendants. The judgment of the learned Chief Justice in that case is remarkable for its brevity and may be quoted *verbatim*. It is as follows:—"Having regard to the language of sections 106 and 108 of the Civil Procedure Code (Act XIV of 1882) the question must be answered in the negative." Now it has been contended on behalf of the respondents that great difficulties will arise if the contention advanced on the part of the appellants is allowed to prevail. For example, the case was put in which an *ex parte* decree had been executed by a sale of property to third parties. It is suggested that on the setting aside of the decree there would be serious difficulty experienced in adjusting the rights of the parties, including the auction purchaser, and injustice might be worked. It seems to me, however, that, having regard to the provisions of article 164 of the Indian Limitation Act, which prescribes that an application for an order to set aside a judgment *ex parte* shall be made within 30 days from the date of executing any process for enforcing the judgment, largely minimises the possibility of any such difficulty arising, inasmuch as in the short period of 30 days it is improbable, if

(1) (1893) I. L. R., 18 Bom., 142.

not impossible, that a sale could be carried out. For the foregoing reasons I would allow this appeal, set aside the order of the Subordinate Judge and also the *ex parte* decree passed against all the defendants, and direct that the suit be restored to its original place on the register, and be tried according to law. The plaintiffs are to blame, in that they sued minors and did not take the precaution of seeing that a guardian *ad litem* was appointed for them. They cannot therefore complain. The appellants, other than Bhura Mal, are, I think, entitled to their costs of this appeal. Bhura Mal ought to abide his own costs.

It may be well to point out to the learned Subordinate Judge that before proceeding with the disposal of the suit a guardian *ad litem* must be appointed by the Court for the minor defendants pursuant to section 443 of the Code of Civil Procedure. I desire to add that I express no opinion on a case in which a decree passed against several defendants consists in reality of separate decrees as against each; I merely hold that where a decree is one and indivisible, as is the decree in this case, it must be set aside in its entirety.

BURKITT, J.—On the admitted and proved facts of this case in which *none* of the defendants appeared at the hearing, and a decree was passed against them *all ex parte*, I have come to the same conclusion, and very much for the same reasons, as the learned Chief Justice, and concur in directing that under section 108 of the Code the *ex parte* decree should be set aside as against all the defendants, and a day appointed for proceeding with the suit. But I desire to confine myself to the facts of this case, and I refrain from expressing any opinion whatever on a case in which, while some of several defendants appeared and defended the suit, others, as to whom a decree had been passed *ex parte*, made an application under section 108 of the Code. Such is not the case here, and it is therefore unnecessary for me to say whether in such a case I would be prepared to follow the Calcutta decisions cited by the learned Chief Justice.

AIKMAN, J.—This is an appeal under section 588(9) of the Code of Civil Procedure against an order rejecting an application under section 108 of the Code to set aside a decree which had been passed *ex parte* against the appellants. The suit in

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which the *ex parte* decree was passed was instituted by the plaintiffs respondents on the 27th of April, 1900. It was brought against (1) Bhura Mal, (2) Musammat Gayatri widow of Ganga Prasad a deceased son of Bhura Mal and (3) Jumna Das, son of Bhura Mal.

The plaint alleged the second and third defendants to be minors, and asked for an order for the appointment of the first defendant as their guardian *ad litem*.

This application, we are informed, was not supported by the affidavit required by section 456 of the Code, *i.e.* an affidavit verifying the fact that the proposed guardian had no interest in the matters in question in the suit adverse to that of the minor, and that he was a fit person to be appointed guardian.

On receipt of this plaint the Court issued two notices to Bhura Mal, one to appear and defend the suit brought against him, the other a notice calling upon him to appear and state whether he was willing to act as guardian *ad litem* for the minors.

Both notices were made returnable on the 14th of June, 1900, the date fixed for the hearing of the suit. On that date no appearance was made by or on behalf of any of the defendants, and the Court took up the case *ex parte*, and passed a decree in favour of the plaintiffs.

On the 26th of June, 1900, the plaintiffs applied for execution of the decree. On the 8th of July, 1900, certain immovable property was attached, and a notification was issued fixing the 30th of October, 1900, for the sale of the property in satisfaction of the decree. One day before the date fixed for the sale, *i.e.* on the 29th of October, the defendants applied under section 108 of the Code for an order to set aside the *ex parte* decree. The application was presented by Bhura Mal for himself and as guardian of his son Jamna Das, and by one Radha Ballabh as guardian of Musammat Gayatri. The defendants alleged that the summonses had never been served on them, and that until the 2nd of October, 1900, they had had no knowledge of the suit or of the subsequent proceedings. After a careful review of the evidence the lower Court came to the conclusion that Bhura Mal's allegation that he had no notice of the suit or of the

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application to appoint him guardian *ad litem*, or of the subsequent proceedings, was false, and it rejected the application for an order to set aside the *ex parte* decree.

In their appeal to this Court the defendants repeat their allegation that they had no notice of the suit, and assert that the *ex parte* decree was obtained by fraud with the help of the amin and the peons of the Court.

The learned counsel for the appellants frankly admitted that he was unable to support the appeal in so far as it impugned the finding of the lower Court that the defendant Bhura Mal had been served with notice of the suit, and with the notice to appear and state whether he was willing to act as guardian *ad litem* for his minor co-defendants.

In this I think the learned counsel was well advised, for the grounds and the reasoning upon which the lower Court has based its finding appear to me to be unassailable.

The learned counsel for the appellants relies upon the fourth plea in the memorandum of appeal, and contends that the minor defendants are clearly entitled to have the *ex parte* decree against them set aside, inasmuch as they were never properly represented in the suit, no appointment of a guardian *ad litem* having been made. This plea must, in my judgment, be sustained. Section 443 of the Code provides that when the defendant to a suit is a minor, the Court shall appoint a guardian for the suit for the minor. But before making such appointment, the Court must be satisfied, not only of the fact of the minority, but also that the person it appoints is a fit person for the post. An application for the appointment of a guardian may be made either in the name and on behalf of the minor defendant, or by the plaintiff, and in such application the name of a proposed guardian may be submitted for the approval of the Court. But before granting the application the Court must apply its mind to the consideration of the question whether the person nominated is in every way fit for the post. The Court must be satisfied that the person it appoints will safeguard the interests of the minor, and that he has no interests of his own which will come into conflict with the minor's interests in the suit. In the present case the plaintiff applied for the appointment of Bhura Mal as guardian; but,

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as stated above, without filing the affidavit required by law. The Court contented itself with serving Bhura Mal with notice to appear and state whether he was willing to act. No appearance being made, the Court proceeded to dispose of the suit forthwith, without making any formal order appointing a guardian for the minors. It is true that the mere absence of a formal order is not necessarily fatal to the suit, as was held by a Full Bench of the Calcutta High Court in *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb* (1). But before the absence of a formal order can be looked on as a mere irregularity, we must, as was held in the case just cited, be satisfied that the Court applied its mind to the consideration of the question of the representation of the minor, and arrived at the conclusion that the guardian nominated was in every way a fit person to safeguard the interests of the minor in the case before it. In the present instance, it is quite clear that the Court below did not do this. The plaintiff's claim was to recover money on a balance of account signed by the defendant Bhura Mal, and the minor defendants were impleaded because the plaintiffs wished to proceed against the joint family property. Now in such a case it would have been open to Bhura Mal's son to dispute the existence of the debt, or to show that it was not of a nature to bind the joint family property. How was the lower Court satisfied that in a case of this nature the father had no interest in the matters in question in the suit adverse to that of his minor son? It is quite clear that the lower Court blindly accepted the plaintiff's nomination without ever coming to a judicial determination as to the fitness of the person nominated. Under these circumstances the absence of an order appointing a guardian for the minors is, in my judgment, a fatal defect. This is in accordance with the principles laid down in the Calcutta case cited above, with which I fully concur. It follows that the decree passed by the lower Court on the 14th of June, 1900, against the minors was passed when they were not properly represented in the suit, and ought to have been set aside. I therefore hold that the lower Court was wrong in rejecting the application made under section 108 of the Code of Civil Procedure on behalf of the minors for an order to set aside the decree.

(1) (1886) I. L. R., 14 Calc., 204.

A question of more difficulty now falls to be discussed, and that is, whether the *ex parte* decree which was passed against Bhura Mal should also be set aside. If he had been the sole defendant to the suit, it is clear that there would have been no ground whatever for disturbing the *ex parte* decree. The lower Court's judgment, which is now under consideration, shows conclusively that Bhura Mal's allegations—allegations which he verified—that he had no notice of the suit and subsequent proceedings are not to be believed. So far as he personally is concerned, he is no more entitled to have the decree set aside than if he had appeared and defended the suit. But he was not the sole defendant, and we have to consider whether the decree against his co-defendants can be set aside and the case reopened without at the same time setting aside the decree as against him.

In the case of *Kesho Pershad* v. *Hirday Narain* (1) an *ex parte* decree was passed against a mother personally, and also as guardian of her two infant sons. She applied to have the decree set aside, alleging that the summons had not been duly served upon her. The Subordinate Judge held that service of the summons on her was clearly proved and dismissed the application. On appeal Markby and Mitter, JJ., held that service of summons upon the mother being proved they had no power to interfere so far as she was concerned. But as regards the minors they allowed the appeal, observing that it was not to be expected that they could have appeared in person, and that they had a right to expect that their lawful guardian would take the proper, and what in this case was obviously a necessary, step to protect their interest. Accordingly the learned Judges set aside the *ex parte* decree so far as regarded the minors, and remanded the case to the lower Court to be proceeded with as against them in the usual way, at the same time declaring that the decree stood good as regards the mother.

This case bears a remarkable similarity to the case now before us, but the report leaves us in the dark both as to the nature of the suit and of the decree which was passed in it.

The provisions of the law as to setting aside *ex parte* decrees were practically the same under the previous Codes,

(1) (1876) 6 C. L. R., 69.

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Act No. VIII of 1859 and Act No. X of 1877, as they are in the present Code.

Section 106 of the present Code provides that if there be more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall at the time of passing judgment make such order as it thinks fit with respect to the defendants who do not appear. Under the concluding words of this section, it has been the universal practice to pass an *ex parte* decree against the absent defendant, when the plaintiff proves that the summons has been duly served, and that as against him he is entitled to a decree.

Section 108 of the Code provides that when a decree is passed *ex parte* against a defendant, he is entitled on making out a sufficient case to get an order to set aside the "decree." What is meant here by the words "the decree"? In my opinion they refer back to the opening words of the section, and denote the decree passed *ex parte* against the defendant who makes out a case for having it set aside. On an order being passed to set aside an *ex parte* decree, the Court has to appoint a day "for proceeding with the suit." I take it that this means, unless under exceptional circumstances, to be presently referred to, for proceeding with the suit against the defendant who has succeeded in getting the *ex parte* decree set aside.

In support of this view, I would refer to the case *Huro Krishno Doss* v. *Motee Chand Baboo* (1). That was a case in which the learned Judges, Seton-Kerr and Mitter, JJ., had to consider the question whether, when an *ex parte* decree passed against one defendant was set aside on his application, the whole case was reopened against the defendants who had appeared. They answered the question in the negative, and in the course of their judgment they say :—"The only difficulty we felt is with the words 'shall appoint a day for proceeding with the suit'. But we interpret these words to mean that a day is to be appointed for proceeding with the suit so far as the defendant who has applied to the Court is concerned. In the preceding part of the sentence, it is said :—'The Court shall pass an order to set aside the judgment'. [In the present Code the word 'decree' has been

(1) (1867) 8 W. R. C. R., 260.

substituted for 'judgment', but this does not affect the reasoning.] What is the judgment herein referred to? Assuredly the judgment described in the very first sentence of the section, *i.e.* the judgment passed *ex parte* against a defendant who has not appeared. If, therefore, the law gives power to the Court to set aside this judgment, and this judgment only, we do not see how the Court can proceed to try the suit with reference to the other defendants as against whom the judgment passed has not been set aside." Substitute the word 'decree' for judgment, and this reasoning of the learned Judges applies in all its force to the question we have to consider. That reasoning, subject to an important qualification which I shall presently set forth, I thoroughly approve of and adopt.

Before considering the recent decisions bearing on the point, I will refer shortly to some of the older cases cited in the course of the argument. *Doorga Persaud Ghose* v. *Greeshchunder Bose* (1) was a case under the Rent Act, the provisions of which as to revival of suits do not differ materially from those of the Code of Civil Procedure. In this case an *ex parte* decree was passed against the defendants, none of whom put in an appearance. On the application of one of the defendants, the case was reopened, and on the rehearing, the Deputy Collector dismissed the plaintiff's suit, not only as against the defendant who had applied for a rehearing, but as against all the defendants. On appeal by the plaintiffs the High Court (Trevor and Campbell, JJ.) was of opinion that there could be "no doubt that the original decree of the Deputy Collector against those parties who had not applied for a review must be considered to be still in force as regards them," and allowed the plaintiff's appeal against those parties.

Brojonath Surmah Chuckerbatty v. *Anund Moyee Debia Chowdhrain* (2) was also a case under the Rent Act, and the same view was taken by the Judges (Loch and Macpherson, JJ.), as in the case last cited, though it was not referred to in the judgment.

The case of *Dookhee Khan* v. *Rajessuree Ranee* (3) was one in which a plaintiff obtained an *ex parte* decree for money

(1) (1864) 1 W. R. C. R., 222. (2) (1867) 7 W. R. C. R., 237.
(3) (1871) 15 W. R., 371.

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against three defendants. One of the three applied to have the case reopened, and his application was granted. On the re-hearing the Court found him not liable, and exonerated him from the plaintiff's claim. The Judge of the Court of Small Causes, before whom the case was, upheld the original decree against the defendants who had not moved to set it aside, but being doubtful whether this was in accordance with certain Rules of Practice issued by the Sadr Court, referred the point to the High Court. The learned Judges who heard the reference (Norman, C.J. and Loch, J.), answered it in the following cautious terms. I quote the answer *in extenso*, as hitherto the cases had all been one way, and in this case we find for the first time what appears to me to be the true principle for deciding the question at issue:—"We think it may be competent to the Judge of the Small Cause Court, on hearing the objections by one of the several defendants, to set aside the decree as to all, if justice seems to require it; as for instance, if the objection is one which is common to the case of all; but that he is by no means bound, because the decree is set aside as to one of several defendants, to interfere with the decision already pronounced against others who do not object, and in fact may have no ground for objecting, to the decree."

Coming to cases of more recent date, the first in order of time is that of *Manaku kom Pedru* v. *Sitaram Atmaram Vagh* (1). In that case the plaintiff brought a suit against one Francis Pedru and his mother Manaku to recover Rs. 476-9-0 due upon a promissory note executed jointly by the defendants. At the hearing Pedru alone appeared and resisted the claim. The Subordinate Judge passed a decree against both the defendants. Subsequently the mother applied to set aside the decree passed *ex parte* against her, and the Subordinate Judge referred to the High Court the question whether, on her application being granted, the case would be reopened with reference to the first defendant also.

The following was the answer made to the reference by the learned Judges (Sargent, C.J. and Bayley, J.):—"Having regard to the language of sections 106 and 108 of the Civil

(1) (1893) I. L. R., 18 Bom., 142.

Procedure Code (Act XIV of 1882) the question must be answered in the negative."

The next case is that of *Mahomed Hamidulla* v. *Tohurennissa Bibi* (1). That, like the Bombay case just referred to, was a suit against several defendants on a promissory note. Some of the defendants appeared and resisted the suit. Two of the defendants did not appear. The Court passed a decree against all the defendants. The two defendants against whom the decree had been made *ex parte* afterwards made an application under section 108 of the Code to have the decree set aside. The application was granted, and the decree was set aside by the lower Court, not only as against the applicants, but also as against the other defendants who had appeared and defended the suit. The plaintiff appealed, and the learned Judges, Maclean, C.J. and Banerji, J., held that the decree had been rightly set aside against all the defendants. The learned Chief Justice does not refer in his judgment to any of the previous decisions of his Court. Whilst admitting that the language of section 108 is not so clear as it might be, he is of opinion that when the section says the Court should set aside "the decree," it must mean the decree—the whole decree in the suit. With the utmost possible respect for the opinion of the learned Chief Justice, I am unable to follow him in the construction he places on the words of the section. As I have stated above, I am of opinion that the words "the decree" must be read in conjunction with the opening words of the section. In any case in which a decree is passed *ex parte* against a defendant, the words "the decree" mean the *ex parte* decree referred to in these opening words. In his judgment Banerji, J., says:—"It may often happen that the setting aside of the decree as regards some of the defendants renders it necessary in the interest of justice that the whole decree should be reopened." With this view, which is in accord with what Norman, C.J., said in the case in 15 W. R., 371, I am in entire concurrence.

The learned Judges who decided the case in I. L. R., 25 Calc., had occasion to consider it in a recent case *Monomohini Chowdhurani* v. *Nara Narayan Roy Chaudhri* (2). Referring to the case in 25 Calcutta, the learned Chief Justice says:—

(1) (1897) I. L. R., 25 Calc., 155. (2) (1899) 4 C. W. N., 456.

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"In that case there was only one decree—one and indivisible, as my learned brother pointed out, and we did not see how under such circumstances, and having regard to the language of section 108, it could be set aside otherwise than in its entirety." This would seem to be a departure from the position taken up in the earlier case, which was, that the language of section 108 is imperative and necessitates the whole decree being set aside. I entirely agree with the view that when the decree is one and indivisible it must be set aside as a whole, or not at all. To hold that a decree which is "one and indivisible" could be set aside in part, and in part maintained, would be a contradiction in terms. Banerji, J., referred to the earlier case as holding that when on an application of one or more of the defendants the decree is set aside under section 108 of the Code "the Court *has power* to set aside the entire decree." If that is all that was held in the earlier case, I see no reason to differ. In my opinion the Court must be assumed to have the power to set aside the whole decree, if the decree from its nature is one and indivisible, or if, in order to give to the defendants against whom an *ex parte* decree has to be pronounced the relief to which they are entitled, it must be set aside as a whole. Take the case which was put to us in argument. *A* comes into Court on the allegation that *X* and *Y* are in joint possession of certain immovable property and asking for a declaration that he is in joint possession along with them. *X* appears and defends the suit. *Y* does not appear. The Court finds that *X* and *Y* are in joint possession, and that *A* is entitled to the relief he asks for, and decrees accordingly. If *Y* succeeds in getting an order to set aside the decree passed *ex parte*, it is evident from its very nature that the whole decree must be set aside, otherwise, in the event of *Y* succeeding ultimately in the suit, this absurd position would arise that *X* and *Y* being in joint possession of the property, *A* would be in possession of a decree declaring him to be jointly in possession along with *X* and *Y*, whilst *Y* would have a decree in his favour that *A* was not in joint possession with himself and *X*.

Now, adverting to the present case we have the plaintiffs coming into Court on the assumption that the defendants are members of a joint Hindu family, and seeking to get a decree for the debt

which Bhura Mal has incurred, under which they, the plaintiffs, will be able to attach the joint family property. In such a suit the minor defendants are entitled to show, if they can, that the debt never was incurred, or that it has been discharged, or that from its nature the joint family property would not be liable. This being so, it appears to me that in order to give the minors the relief to which they are justly entitled, the decree must, on the principles set forth above, be set aside as a whole.

For these reasons I would allow the appeal, and, reversing the order of the lower Court, would make an order setting aside the *ex parte* decree of the 14th June, 1900, and directing the lower Court to appoint a day for proceeding with the suit against all the defendants.

Although I make this order in favour of all the defendants, I feel bound to say that I have no sympathy with the appellant Bhura Mal. It is only from the necessity of the case that I hold the decree against him must be set aside. He came into Court making baseless allegations of fraud, and falsely asserting that he had no knowledge of the suit and subsequent proceedings. For this reason I am of opinion that, although the minors are entitled to their costs here and in the Court below, Bhura Mal is not entitled to his costs. I cannot conclude without expressing my regret that though the Legislature has by the provisions of Chapter XXXI of the Code of Civil Procedure, done its best to safeguard the interests of minors, the object of the Legislature was in this case defeated by the neglect of these provisions.

BY THE COURT.—The order of the Court is that the appeal be allowed and the order of the lower Court reversed. We set aside the *ex parte* decree of the 14th of June, 1900, and direct the lower Court to appoint a day to proceed to the hearing of the suit against all the defendants. As regards the costs, we all are of opinion that Bhura Mal is not entitled to the costs of this appeal, but that the other defendants, the minors, are so entitled, and inasmuch as the appeal has been a joint appeal on behalf of all the order of the Court is that the minor defendants be allowed two-thirds of the costs of this appeal and two-thirds of the costs of the proceedings under section 108 in the Court below.

Appeal decreed.

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April 24.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Burkitt and Mr. Justice Aikman.

UDIT UPADHIA AND ANOTHER (DEFENDANTS) *v.* IMAM BANDI BIBI (PLAINTIFF).*

Act No. III of 1877 *(Indian Registration Act), sections* 73, 74, 75, 76, 77*—Registration—Refusal by Sub-Registrar to register on the ground of denial of execution—Application to Registrar to order registration not made within the prescribed time—Suit in Civil Court to compel registration barred.*

When registration of a document has been refused by a Sub-Registrar under section 71 of the Indian Registration Act, 1877, on the ground of denial of execution by one of the alleged executants, no suit will lie in a Civil Court to compel registration unless an application has been made to the Registrar under section 73 of the Act to establish the right of the applicant to have the document registered, and has been made "within thirty days after the making of the order of refusal."

In computing the period of thirty days within which such last-mentioned application must be made, the applicant is not entitled to the exclusion of the time necessary for obtaining a copy of the Sub-Registrar's reasons for refusing to register.

When, under these circumstances, an application is made to the Registrar after the time limited has expired, and is rejected on the ground of limitation, such rejection cannot be considered as a refusal to register within the meaning of clause *(b)* of section 76 of the Act. *Bhagwan Singh* v. *Khuda Bakhsh* (1), *Edun* v. *Mahomed Siddik* (2), *Lakhimoni Chowdhrain* v. *Akroomoni Chowdhrain* (3), *Shama Charan Das* v. *Joyenoolah* (4), *Kunhimmu* v. *Viyyathamma* (5) and *Veeramma* v. *Abbiah* (6) referred to.

IN the suit, out of which this appeal arose, the plaintiff alleged that the defendants had, by a sale-deed dated the 19th of October, 1900, conveyed to her certain landed property for a sum of Rs. 499-10-2, of which amount all but Rs. 200 had been paid. The sale-deed, being a document which by law was compulsorily registrable, was presented for registration at the office of the Sub-Registrar on the 13th of November 1900. The defendants being sent for denied execution of the deed. The Sub-Registrar accordingly refused to register the deed, and, as required by section 71 of the Registration Act, endorsed upon it the words "registration refused." This order was passed on the 15th of November, 1900. On the 19th of November the

*First Appeal No. 90 of 1901 from an order of J. H. Cumming, Esq., District Judge of Azamgarh, dated the 10th of June 1901.

(1) (1881) I. L. R., 3 All., 397.
(2) (1882) I. L. R., 9 Calc., 150.
(3) (1883) I. L. R., 9 Calc., 851.
(4) (1885) I. L. R., 11 Calc., 750.
(5) (1884) I. L. R., 7 Mad., 535.
(6) (1893) I. L. R., 18 Mad., 99.

plaintiff applied for a copy of the reasons for the order of refusal, and obtained it the same day. On the 17th of December the plaintiff presented an application to the Registrar under section 73 of the Registration Act praying that the deed might be registered. But the period within which such an application might be presented had expired on the 15th of December, and the Registrar therefore rejected the application as filed beyond time. The Registrar's order rejecting the plaintiff's application was passed on the 19th of December, 1900.

Within thirty days from the making of that order, namely, on the 14th of January, 1901, the plaintiff filed in the Court of the Munsif a suit, purporting to be a suit under section 77 of the Registration Act, to obtain registration of the sale-deed. The defendants filed a written statement denying that they had ever executed any sale-deed in the plaintiff's favour or received any consideration money from her. They further pleaded that the suit was not maintainable, inasmuch as the plaintiff had not made her application to the Registrar within the time required by law. The Munsif sustained this objection, and, holding that the suit did not lie, dismissed it with costs.

The plaintiff appealed, contending in the first place, that the application to the Registrar was within time, inasmuch as she was entitled to deduct the time spent in obtaining a copy of the Sub-Registrar's reasons for refusing to register, as well as Sunday the 16th of December, and in the next place that, whether her application to the Registrar was in time or not, the Civil Court was in either event competent to pass a decree directing registration.

The lower appellate Court (District Judge of Azamgarh) considered that the plaintiff's application to the Registrar was within time, and so holding, set aside the Munsif's decree and remanded the case under section 562 of the Code of Civil Procedure for disposal on the merits.

Against this order of remand the defendants appealed to the High Court.

Munshi *Gokul Prasad*, for the appellants.

Mr. *Abdul Raoof* (for whom Mr. *Karamat Husain*), for the respondent.

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UDIT UPADHIA v. IMAM BANDI BIBI.

BURKITT, J.—The facts in the case out of which this appeal has arisen are as follows:—

The plaintiff asserts that the defendants-appellants sold to her certain immovable property and executed a formal conveyance of the same to her; that when the conveyance was presented for registration, the defendants-appellants denied execution, whereupon the Sub-Registrar refused to register it. This was on November 15th, 1900. The next incident in the case is that the plaintiff respondent on December 17th, 1900, made an application to the Registrar under the provisions of section 73 of the Registration Act, No. III of 1877. The application was clearly made two days beyond the time limited by that section, and the Registrar therefore summarily rejected it. The present suit was then instituted under the permission given by section 77 of the Act. The plaintiff respondent prays for a declaration of her right to have the conveyance mentioned above registered.

The Munsif held that the suit was not maintainable. On appeal the District Judge of Azamgarh reversed the decision of the Munsif and remanded the record to thr first Court under section 562 of the Code of Civil Procedure to be decided on the merits. Hence this appeal.

Now it seems to me that the decision of the learned District Judge is entirely wrong, and that he failed to comprehend the question he had to decide. That question was—had the Munsif decided rightly or not in holding that this suit would not lie? There was no question of limitation raised in the suit. Admittedly the suit was within time.

The District Registrar of Deeds is not a Court nor a judicial officer. He is simply a public official performing certain functions under the Registration Act. *Vide* sub-section 2 of section 195, and section 483 of the Code of Criminal Procedure. The Limitation Act, No. XV of 1877, being (as described in the preamble) an Act to "amend the law relating to the limitation of suits, appeals, and certain applications to Courts" cannot possibly apply to a District Registrar in the discharge of his functions under the Registration Act. When, therefore, the learned Judge, wrongly applying certain sections of the Limitation Act to the proceedings before the Registrar under

section 73 of the Registration Act took it on himself to decide that the application made to the Registrar under section 73 of the Registration Act "was within time," he decided a question which, I think, does not arise in the case, and he decided it wrongly. In my opinion the decision of the Munsif is correct, and I have come to that opinion for much the same reasons as those given by him.

I am of opinion that the right of suit given by section 77 of the Registration Act arises only when the Registrar, on an application complying with *all* the provisions of the second and third paragraphs of section 73 of the Act having been presented to him, has upheld the order of the Sub-Registrar, and has refused to direct the document to be registered. One of the conditions precedent to the presentation and admission of an application under section 73 of the Act, as laid down in the second paragraph of that section, is that the application must be made *within thirty days* from the date of the order of refusal by the Sub-Registrar. Now this period of thirty days is one which I must presume was intentionally inserted in this section by the Legislature, with the object, most probably, of procuring a speedy settlement of the question as to whether a particular document was or was not to be registered. It is a provision which, I presume, the Legislature intended to be obeyed, and not to be disregarded. I cannot believe the Legislature intended that the limitation period of thirty days might be disregarded, and that the rejection of an application presented under section 73, say, 20 years after the refusal by the Sub-Registrar, would give a right of suit under section 77. When then an application purporting to be an application under section 73 of the Act is presented to the Registrar after the expiration of the thirty days limited by that section, such an application is not, in my opinion, an application which could be entertained under that section, and the summary rejection of such an application, on the ground that it was put in beyond time (as happened in the present case) cannot be considered to be a refusal under section 76 of the Act to order the document to be registered within the meaning of the opening words of section 77 of the Act, so as to give a right of suit under section 77. It is, in my opinion, immaterial that in most cases a suit so

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instituted would probably fail. The question we have to decide is not whether such a suit might be successful, but whether it could be entertained. It is absolutely immaterial that delay in applying under section 73, was only two days (as here) or two years or twenty years. In support of my opinion I would refer to section 74 of the Act, on which sections 75 and 76 depend. The section provides that "in such case" the Registrar is to proceed to make certain inquiries, and on the result of those inquiries, to decide whether he will direct the document to be registered, or whether he will refuse to pass such order. Now to my mind the words "in such case" in section 74 are most important. They govern section 74 and the following sections, and in my opinion import into section 74 all the provisions of section 73, and clearly imply that it is only when an application, purporting to have been presented under section 73, complies with all the conditions required by that section, that action is to be taken under section 74 and the two following sections. Clearly, in my opinion, when an application is summarily rejected as being in violation of the conditions required by section 73 that rejection cannot be considered a refusal to direct registration under section 76 so as to give a right of suit under section 77 of the Act. The words "refuses to order the document to be registered under section 76" imply, in my opinion, that the document must have been presented in time under section 73, and that after inquiry the Registrar has refused to direct it to be registered. I hold, therefore, that there has been no "refusal" to direct registration, in this case under section 76, the Registrar not having applied his mind to the question as to whether the document ought to be registered, but having simply thrown out (as he was bound to do) a petition which purported to be an application under section 73, but which, being presented after the prescribed period had expired, was not an application complying with the requirements of that section and could not be entertained.

With section 72 we have no concern in this case.

Finally, I would point out that right of suit given by section 77 of the Act is a right consequential on a refusal under section 76, which refusal is based on the inquiry directed by section 74, and if

there be no such refusal (as in the present case), no right to sue accrues under section 77. But the contention for the respondent in this appeal is, that though no inquiry could have been made in the present case under section 74 (as a matter of fact no inquiry was made), and consequently there could have been no refusal to direct registration under section 76, nevertheless the rejection of the time-barred petition gives a right to institute the suit provided for in section 77 of the Act. I am unable to adopt that contention, and as to the argument that the rule I have laid down might have a disastrous effect on a party who had neglected to apply within the thirty days, I think it unnecessary to say more than "*vigilantibus non dormientibus jura subveniunt.*" In short, my position is that as the application did not comply with the requirements of section 73, there could not have been (and there was not) any inquiry under section 74, nor a refusal under section 76, and consequently no right of suit under section 77 of the Registration Act.

In support of the opinion I have expressed above I would cite the case of *Edun* v. *Mahomed Siddik* (1). That case is in every way on all fours with the present case. In it the Sub-Registrar had refused to register a document on January 31st, and on April 8th an application, purporting to be one under section 73, was made to Registrar, who rejected it because it was presented too late. A suit was then brought under section 77 of the Act to compel registration. The Munsif dismissed the suit, and the Judge (as here) having reversed that decision, the High Court in second appeal affirmed the decision of the Munsif and set aside that of the District Judge. The Munsif had held that a Civil Court could not direct the registration of an instrument of which registration had been refused, and as to which the person complaining of non-registration had not presented an application under section 73 to the Registrar "in time" and held that "the suit was barred, inasmuch as the application under section 73 was not presented within thirty days after the Sub-Registrar had refused registration." A Division Bench of the High Court, consisting of the Officiating

(1) (1882) I. L. R., 9 Calc., 150.

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Chief Justice and Mr. Justice Norris, after holding that, independently of section 77 of the Registration Act, such a suit would not lie, proceeded as follows :—

"In this case the plaintiffs cannot succeed under section 77 of the Act, because they did not comply with the conditions precedent to the maintenance of a suit under that section." Then as to the argument that those conditions were complied with when an application was made to the Registrar complaining of the Sub-Registrar's refusal to register the learned Judges say :—"this argument is not valid ; the application referred to was not made within the time allowed by the Act. Under these circumstances we are of opinion that it cannot be said that the plaintiffs have complied with the conditions precedent for the maintenance of a suit under section 77."

In the course of their judgment the learned Judges cited with approval the judgment of the Full Bench of this Court in the case of *Bhagwan Singh* v. *Khuda Bakhsh* (1). That case is not exactly on all fours with the present case, for in it the plaintiff did not make any application to the Registrar under section 73 of the Registration Act, but instituted a suit to compel registration without taking any steps under that section. The Full Bench, while regretting to find themselves constrained by the plain language of the law to admit the validity of the objection raised to the maintenance of the suit, observed that unfortunately for the plaintiff "he has failed to satisfy all the conditions precedent to the bringing of such a suit by omitting to make the application to the Registrar provided by section 73." And again, "the suit mentioned in section 77 may be instituted where the Registrar refuses to order the document to be registered, and in having failed to fulfil all the necessary preliminaries the plaintiff has put it out of the power of the Civil Court to give him the relief he asks. To decree the prayer of this plaint in terms would be to direct a public officer to do that which he is specifically and plainly told not to do." This case is no doubt one in which no application had been made under section 73, but from the language used by the Full Bench, it is to my mind perfectly clear that the learned Judges would not have held that an

(1) (1881) I. L. R., 3 All., 397.

application made to the Registrar under section 73 two days or two years or twenty years after the expiration of thirty days from the date of the Sub-Registrar's refusal to register satisfied "all the conditions precedent" to the bringing of a suit under section 77, or was a fulfilment of "all the necessary preliminaries." That, however, is the contention on behalf of the respondent, namely, that the rejection by the Registrar of an application made to him after the period of thirty days prescribed by section 73 had expired—an application which the Registrar was bound by law to reject summarily and could not entertain—amounted to a "refusal to direct registration" within the meaning of sections 76 and 77 of the Registration Act, and gave the applicant a right to institute the suit provided by section 77 of the Act.

The last case which I would cite is that of *Kunhimmu* v. *Viyyathamma* (1), which also is exactly on all fours with the present case, the application under section 73 not having been made till after the period of thirty days had expired. A Divisional Bench of the High Court, consisting of the Chief Justice and Mr. Justice Ayyar, cited with approval the rulings in the two cases mentioned above, and observed that the plaintiff had not complied with the directions of the Act, as he had not presented an application under section 73 within the thirty days, "and when after the lapse of the thirty days the application was presented to him the Registrar properly refused to receive it." And again:—"It is only when an application has been made to the Registrar in time and, after inquiry, registration has been again refused that a Civil Court is competent under section 77 to order registration." The case of *Ram Ghulam* v. *Chotey Lal* (2), has, in my opinion, no bearing on the present case, inasmuch as in it no steps of any kind were taken under the Registration Act by the plaintiff to compel registration of the document which the defendant had refused to register.

In my opinion the authorities I have just cited fully support the opinion I expressed at an earlier portion of this judgment, and I hold that as the plaintiff did not present an application to the Registrar under section 73 of the Registration Act within the limitation period prescribed by that section, no right to sue

(1) (1884) I. L. R., 7 Mad., 535. (2) (1878) I. L. R., 2 All., 46.

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accrued to her under section 77 of the Act. For the above reasons I am of opinion that the decision of the lower appellate Court is wrong and should be set aside.

I have gone at great length into the question mooted in this appeal because, as I have the misfortune to differ from the opinion entertained by the learned Chief Justice, I think that out of respect to him and with great deference to his opinion I should fully set out my reasons for holding the opinion I entertain on that question.

I would allow this appeal, and, setting aside the remand order of the lower appellate Court, I would dismiss the plaintiff-respondent's appeal to that Court, and would restore with costs in all three Courts the decree of the Munsif dismissing plaintiff's suit.

[The Chief Justice, however, taking a different view of the case, the appeal was re-heard under section 575 of the Code of Civil Procedure before a Bench consisting of the Chief Justice, and Burkitt and Aikman, JJ.]

On this hearing the following judgments were delivered:—

AIKMAN, J.—This appeal arises out of a suit purporting to be brought under the provisions of section 77 of the Indian Registration Act, 1877, to obtain a decree for the registration of a document.

The plaintiff's case is that by a sale-deed dated the 19th of October, 1900, the defendants conveyed to her certain landed property for a sum of Rs. 499-10-2, of which amount all but Rs. 200 was paid to them.

The sale-deed, being a document which by the provisions of law is compulsorily registrable, was presented for registration at the office of the Sub-Registrar by the plaintiff's general attorney on the 13th of November, 1900. The defendants being sent for, denied execution of the sale-deed. The Sub-Registrar, therefore, adopted the only course open to him, that is, he refused to register the document, and, as required by section 71 of the Registration Act, endorsed it with the words "registration refused." The order of refusal was passed on the 15th of November, 1900. On the 19th of November the plaintiff applied for a copy of the reasons for the order of refusal, and

obtained it on the same day. There is, of course, no appeal against a Sub-Registrar's refusal to register on the ground of denial of execution, as the Sub-Registrar has no alternative and must refuse. But by section 73 of the Act a right is given to apply to the Registrar in order to establish a right to have the document registered. The section provides that the application must be presented, "within thirty days after the making of the order for refusal."

In the present instance the period of thirty days thus allowed expired on Saturday, the 15th of December, 1900. It was not until Monday, the 17th of December, that the application was presented. Section 26 of the Act provides that whenever a registration office is closed on the last day of any period provided in the Act for the presentation of any document, such last day shall, for the purposes of the Act, be deemed to be the day on which the office re-opens. Had the last of the thirty days fallen on the Sunday, this section might be held to apply, and the application to have been in time. But as it was, the application was a day too late, and the Registrar adopted the only course open to him, that is, he rejected it.

The Registrar's order rejecting the application was passed on the 19th of December, 1900. Within thirty days of the making of that order the plaintiff, on the 14th of January, 1901, instituted, in the Court of the Munsif, the suit out of which this appeal arises. The defendants filed a written statement denying that they had ever executed any sale-deed in the plaintiff's favour or received any consideration money from her. They further pleaded that the suit was not maintainable, inasmuch as the plaintiff had not made the application to the Registrar within the period allowed by law. The Munsif sustained this objection, and, holding that the suit did not lie, dismissed it with costs.

The plaintiff appealed, contending, in the first place, that the application to the Registrar was within time, inasmuch as she was entitled to deduct the time spent in obtaining a copy of the Sub-Registrar's reasons for refusing to register, as well as Sunday the 16th of December; and in the next place, that whether her application to the Registrar was within the period allowed by law or

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beyond it, the Civil Court was in either event competent to pass a decree directing registration.

The learned District Judge sustained the first of these pleas, and, holding that the application to the Registrar was within time, set aside the Munsif's decree, and remanded the case under the provisions of section 562 of the Code of Civil Procedure for disposal on the merits.

Against this order of remand the defendants have preferred the present appeal.

It is contended on their behalf that the Limitation Act does not apply to proceedings under the Registration Act. As my brother Burkitt has shown, that contention is one which must be sustained, and the ground upon which the learned Judge of the Court below set aside the decree of the Munsif cannot be supported. As pointed out in an earlier portion of this judgment, the plaintiff might have been entitled under section 26 of the Registration Act to have the Sunday allowed her, had the period of thirty days prescribed by section 73 of the Act expired on the Sunday. But it did not, and the Legislature has not seen fit to embody in the Registration Act any provision similar to that contained in the second paragraph of section 12 of the Limitation Act. The plaintiff was therefore not entitled to have excluded in the computation of the thirty days the time requisite for obtaining a copy of the Sub-Registrar's reasons for refusing to register. Unless she was entitled to this, her application to the Registrar was beyond time. It must therefore be held that her application to the Registrar was rightly rejected as time-barred.

The learned counsel for the respondent, however, supports the order of the lower appellate Court by arguing that the order of the Registrar rejecting the plaintiff's application is equivalent to a refusal under clause *(b)* of section 76 of the Registration Act, to direct the registration of the document, and that therefore the plaintiff has a right of suit under section 77 of the Act.

Since the decision of a Full Bench of this Court in the case of *Bhagwan Singh* v. *Khuda Bakhsh* (1) which has been approved of by other High Courts, and the correctness of which has never been doubted, it must be taken as settled law that when

(1) (1881) I. L. R., 3 All., 397.

a registering officer has refused to register a document on the ground of denial of execution no Civil Court can pass a decree directing registration unless and until the person propounding the document has applied to the Registrar under section 73 of the Act in order to establish his right to have the document registered. The contention of the learned counsel for the respondent amounts to this, that although, in order to have a right of suit under section 77, a person must make an application to the Registrar under section 73, he may disregard the provisions contained in the latter section in regard to the time within which such application must be made, and choose his own time for putting in his application—a time it may be years after the date on which registration was refused.

When the application thus presented beyond time has been, as it inevitably must be, rejected, a sufficient foundation has, according to the learned counsel's contention, been laid for the suit referred to in section 77.

In my judgment this contention cannot be sustained. In the first place, all the rulings are against it.

In the case of *Edun* v. *Mahomed Siddik* (1), which dealt with the same question as is now under consideration, the learned Judges, Mitter and Norris, JJ., approving of and following the decision of this Court in the case mentioned above, held that a person omitting to make an application to the Registrar as provided by section 73 within the time provided by that section, cannot be said to have complied with the conditions precedent to a suit under section 77.

The case of *Edun* v. *Mahomed Siddik* was followed by Cunningham and Maclean, JJ., in *Lakhimoni* v. *Akroomoni* (2) the learned Judges observing that "unless the requirements of the Act have been complied with no cause of action arises under section 77." One of the requirements of the Act is an application within thirty days after the making of the order of refusal.

In the case of *Shama Charan Das* v. *Joyenoolah* (3) Wilson and Beverley, JJ., after a consideration of section 71 and the

(1) (1882) I. L. R., 9 Calc., 150. (2) (1883) I. L. R., 9 Calc., 851.
(3) (1885) I. L. R., 11 Calc., 750.

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following sections of the Registration Act, observe as follows:—"Now it seems pretty clear on the face of those sections that what is required in order to maintain a suit under section 77 is, that the procedure laid down in those sections shall be followed, that is to say, that there must be a refusal to register by the Sub-Registrar, an appeal within due time to the Registrar, a refusal by the Registrar, and a suit filed in the Civil Court within time." The learned Judges refer in support of their view to the Full Bench decision of this Court in I. L. R., 3 Allahabad, and to the cases of *Edun* v. *Mahomed Siddik* and *Lakhimoni Choudhrain* v. *Akroomoni Choudhrain*, which I have cited above.

The question which we have to decide was also before the Madras High Court in the case *Kunhimmu* v. *Viyyathamma* (1), a case which was on all fours with the present. The learned Judges, Turner, C.J. and Muttusami Ayyar, J., citing with approval the decision in *Edun* v. *Mahomed Siddik* and the Full Bench decision of this Court, held that the plaintiff's suit could not be maintained, observing:—"It is only when an application has been made to the Registrar in time, and when after inquiry registration has been again refused, that a Civil Court is competent under section 77 to order registration."

The case of *Bhagwan Singh* v. *Khuda Bakhsh* (2) differs in one important respect from the present case. There, after the Sub-Registrar's refusal to register the document, the plaintiff went direct to the Civil Court without, in the first instance, making any application to the Registrar. This has to be borne in mind in considering the effect of the Full Bench decision. Still there are passages in the judgment which, in my opinion, tell against the respondent's contention. For instance, the Court observes:—"The plaintiff's suit . . . . asks for the relief that would be prayed in a suit regularly brought in accordance with the terms of section 77 of the Registration Act. But unfortunately for him he has failed to satisfy all the conditions precedent to the bringing of such a suit by omitting to make the application to the Registrar provided for by section 73." Now it appears to me that an application to the Registrar after the expiry of the thirty days allowed by the section is not

(1) (1884) I. L. R., 7 Mad., 535. (2) (1881) I. L. R., 3 All., 397.

"the application provided for by section 73." Later on the Court observes:—"In having failed to fulfil all the necessary preliminaries the plaintiff has put it out of the power of the Civil Court to give him the relief he asks."

One of the necessary preliminaries here referred to is an application to the Registrar within the time allowed by law.

In my opinion a careful perusal of sections 73, 74, 75, 76 and 77 will show that they all hang together and relate one to the other.

Section 73 provides that when a Sub-Registrar has refused to register a document on the ground of denial of execution any person claiming under the document may, within thirty days after the order of refusal, apply to the Registrar in order to establish his right to have the document registered.

Under section 74 a Registrar, when an application of this kind is presented, has to enquire, as soon as conveniently may be, into two things—

(a) whether the document has been executed, and

(b) whether the requirements of the law have been complied with on the part of the applicant or person presenting the document for registration so as to entitle the document to registration.

I concur with my brother Burkitt in thinking that the words "In such case," with which section 74 opens, are equivalent to saying, "When, under the last preceding section, an application has been presented to the Registrar within thirty days after the making of the order of refusal."

In the absence of such an application, *i.e.* of an application presented within due time, the Registrar has, in a case like the present, no jurisdiction to make any inquiry whatever: he must reject the application *in limine*. If the interpretation now put on the words "in such case" be correct, it follows that the inquiry under section 74*(b)* cannot refer to an inquiry whether the application was filed within time, but to an inquiry whether all the requirements of the law as to the presentation of the document sought to be registered have been complied with. This view derives some support from the fact that the Registrar has to make an inquiry under section 74*(b)* in cases where there has been no application under section 73, *e.g.*, where the document

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is presented in the first instance to the Registrar himself for registration.

Section 75 relates to the result of the inquiry under section 74 —an inquiry which, as has been held, can only take place on the presentation within time of an application.

It follows from this that the refusal of the Registrar referred to in section 76 is a refusal upon an inquiry which pre-supposes the presentation of an application within time.

From the opening words of section 77 the conclusion necessarily follows that to create a right of suit in the Civil Court there must have been a refusal to order registration following upon an inquiry held upon an application presented within time.

I will now endeavour to show that any other interpretation than that now put upon section 73 and the following sections of the Act would defeat one of the two main ends which the registration law has in view. The first of these is to check the fabrication and forgery of documents. This end the Act endeavours to secure by providing for the identification, in presence of a responsible officer, of the person on whose admission of execution the document is registered, and by prescribing heavy penalties for false personation and false identification before a registering officer. The second main end which the Act has in view is to afford, as far as possible, security of title to persons who take transfers of immovable property either by sale or mortgage This end the Act endeavours to attain, first, by providing in section 17 for the compulsory registration of documents, and next, by enacting in section 49 that no document required by section 17 to be registered shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property, unless it has been registered in accordance with the provisions of the Act.

An instrument affecting immovable property is upon registration copied into a book in the registration office, which book is open to inspection by the public on payment of a small fee. Thus a person who contemplates purchasing or lending money upon immovable property of any kind can, by a search in the registration office, easily ascertain whether any and what incumbrances already exist on the property. In order to render this

as effective a safeguard as possible the Legislature has taken the greatest pains to secure the decision of questions affecting registration in as short a time as possible. This will appear from an examination of Part XII of the Act.

Section 71 provides that when a Sub-Registrar refuses to register he must, without payment and unnecessary delay, give a copy of his reasons on application of any person executing or claiming under the document.

Section 72 provides for an appeal in certain cases of refusal. That appeal must be presented to the Registrar "within thirty days" from the date of the order of refusal; even if the appeal succeeds the appellant will take nothing by it unless he again presents the document for registration "within thirty days" after the Registrar has made his order directing registration.

Section 73 provides for an application to the Registrar when registration has been refused on the ground of denial of execution. That application has to be made "with thirty days" after the order of refusal.

Section 74 provides that when such an application has been presented the Registrar shall proceed to hold an inquiry "as soon as conveniently may be." When, on such inquiry, the Registrar orders the document to be registered, this order will not avail the successful applicant unless "within thirty days" after it is made the document be duly presented for registration—*vide* section 75, second paragraph. Again, when a Registrar dismisses an appeal preferred under section 72, or refuses an application made under section 73, the law gives the unsuccessful party a right to sue in the Civil Court for a decree directing registration, provided he institutes his suit "within thirty days" after the Registrar's order of refusal. And, finally, if he succeeds in obtaining from the Civil Court a decree directing registration, the decree will be waste paper if the document is not presented for registration "within thirty days" after the passing thereof (section 77).

I have gone through these sections in detail in order to show the pains the Legislature has taken to provide that questions affecting the registration of documents should be disposed of as swiftly as possible.

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In the case *Veeramma* v. *Abbiah* (1), Collins, C.J., says:—"It appears to me that it was the intention of the Legislature that questions affecting registration should be as soon as possible decided: to allow a number of years to elapse would be to defeat the intention of the Act.

In the same case Muttusami Ayyar, J., says:—"The intention to prescribe a determinate period for registration is of the essence of the Act."

And in the same case Shephard, J., referring to the sections I have cited above, observes:—"It seems clear that the intention of the Legislature was in all these cases alike to reduce to the shortest limits the time within which parties aggrieved by the Sub-Registrar's or Registrar's orders may take action."

The contention of the learned counsel for the respondent would quite nullify the object which, as I have shown, the Legislature has taken so much pains to secure, inasmuch as, if he is right, a person in whose favour a document had been executed, and who had been refused registration on denial of execution, might wait for years before applying to the Registrar, and on his application being rejected, as it infallibly would be, might sue in the Civil Court, and perchance obtain from that Court a decree for registration, which might have the effect of unsettling titles and ruining *bonâ fide* transferees into whose hands the property had in the meantime passed.

For it must always be borne in mind that, though a deed transferring immovable property cannot affect the immovable property comprised therein until it has been registered, yet when registered it takes effect, not from the date of registration, but "from the time from which it would have commenced to operate if no registration thereof had been required or made," that is, from the date of execution, unless by the deed itself some other time is provided for its taking effect.

I have endeavoured to show that if the plea of the respondent is given effect to, the intentions of the Legislature would be nullified and security of title impaired. Moreover, a wide door would be opened to fraud and collusion of various kinds. It was suggested in the course of the argument that unless the

(1) (1893) I. L. R., 18 Mad., 99.

interpretation contended for by the respondent were adopted, injustice might result if, through some mistake of calculation, a Registrar rejected as time-barred an application which was really within time. If such a mistake were made, it would no doubt be promptly brought to the Registrar's notice, and in such a case there would be nothing to prevent him reviewing his order of rejection. In any event the possible injustice which might result from the hypothetical case put would be as nothing compared with the manifold evils which would follow from sustaining the respondent's contention.

The result is, that I would allow this appeal with costs, and setting aside with costs the order of the learned District Judge, would restore that of the Court of first instance.

BURKITT, J.—I have nothing to add to my former judgment, except that I fully concur in the judgment which has just been delivered by my brother Aikman.

STANLEY, C.J.—I concur with the judgment which has just been delivered by my brother Aikman. After a careful reconsideration of the different sections of the Registration Act, and a perusal which has been afforded to me of the exhaustive judgment which has just been delivered, I am satisfied that what I considered to be the literal grammatical meaning of the language used in the Act does not convey the real intention of the Legislature. The scope and object of the Act was to enforce registration of deeds, and, as has been pointed out so clearly in the judgment just delivered, to enforce speedy registration. To this I think that sufficient weight was not attached in the arguments which were presented to us, nor in my judgment. The mischief which might result from the acceptance of the view which I originally entertained outweighs, I now think, any hardship which may follow from the construction placed upon the statute by my learned colleagues, and I now think that there are adequate grounds for accepting, as I do, their conclusions.

BY THE COURT.—The order of the Court is that the appeal be allowed with costs, that the order of remand be set aside with costs, and that the decree of the Munsif be restored.

[NOTE.—The judgment delivered by Stanley, C.J., on the first hearing of the appeal is not reported, inasmuch as it does not represent his Lordship's ultimate views on the question arising in the appeal.—ED.]

Appeal decreed.

MISCELLANEOUS CIVIL.

1902
May 2.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair and Mr. Justice Burkitt.

DRIG BIJAI SINGH (PLAINTIFF) *v.* THE DEPUTY COMMISSIONER OF GONDA AND ANOTHER (DEFENDANTS).*

Act No. XVIII of 1876 *(Oudh Laws Act), Chapter II—Pre-emption—"Member of the village community"—Under-proprietor—Right of under-proprietor to pre-empt a mahal sold by a proprietor.*

Held that under clause 3 of section 9 of the Oudh Laws Act, 1876, a person holding an under-proprietary interest in a mahal sold by the Court of Wards on behalf of the proprietor of the mahal, was entitled to pre-emption in respect of such mahal as against the vendor.

THIS was a reference made to the High Court by the Judicial Commissioner and the Additional Judicial Commissioner of Oudh under section 9 of Act No. XIV of 1891, as amended by Act No. XVI of 1897. The facts out of which the reference arose were as follows:—

On the 16th of June, 1898, the Deputy Commissioner of Gonda, as Manager of the Court of Wards, sold to one Ram Rup, together with other property, a certain mahal called patti Sabal Shah forming part of the village of Paharpur. The property sold was a proprietary tenure. One Drig Bijai Singh, who was the owner of an under-proprietary tenure in the mahal which had been sold to Ram Rup, brought a suit for pre-emption of the mahal sold, basing his claim on the provisions of sections 7 and 9 of Act No. XVIII of 1876, the Oudh Laws Act.

The Court of first instance (Subordinate Judge) dismissed the plaintiff's suit. The plaintiff appealed to the Court of the District Judge, who confirmed the order of the Subordinate Judge. The plaintiff appealed against the order of the District Judge to the Court of the Judicial Commissioner of Oudh, and the appeal came on for hearing before a Bench consisting of the Judicial Commissioner and the Additional Judicial Commissioner, who, disagreeing as to the correct interpretation of the Act in question, referred to the High Court the question whether or not the plaintiff was entitled to pre-emption.

Babu *Man Mohan Sanyal* (for whom Mr. *Ishaq Khan*), for the appellant.

* Miscellaneous No. 166 of 1901.

Mr. *A. E. Ryves*, for the Court of Wards.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for respondent No. 2.

STANLEY, C.J.—This matter comes before the Court upon a reference under section 9 of the Oudh Courts Act (XIV of 1891) as amended by Act No. XVI of 1897.

The suit was brought to enforce a right of pre-emption, the plaintiff claiming such right as being a person entitled to pre-empt under the provisions of the Oudh Laws Act, 1876 (Act No. XVIII of 1876).

The property to which the suit relates is a mahal called Patti Sabal Shah, and was sold by the Deputy Commissioner of Gonda, as manager on behalf of the Court of Wards, to the respondent, Rup Ram. The plaintiff holds an under-proprietary interest in a portion of the land in the mahal, and by virtue of such interest claimed a right of pre-emption under the provisions of the Act to which I have referred. The learned Judicial and Additional Judicial Commissioners differed in their views upon this question, and in consequence have referred to us the following question, *viz.*—"Whether the appellant (Drig Bijai Singh) in this case is a member of the village community, and as such has a right of pre-emption under clause 3, section 9 of Act No. XVIII of 1876. The Judicial Commissioner was of opinion that the appellant had a right of pre-emption, while the Additional Judicial Commissioner expressed a contrary view.

The language of the section in question is particularly obscure, and it is by no means easy to place an interpretation upon it with any degree of confidence. Chapter VI of the Oudh Laws Act, 1876, deals with pre-emption. In section 7 it is provided that in the absence of any custom or contract to the contrary the right of pre-emption shall be presumed—"*(a)* to exist in all village communities however constituted, and whether proprietary or under-proprietary." Then the devolution of the right when property to be sold or foreclosed is a proprietary or under-proprietary tenure is dealt with in section 9, which runs as follows:—"If the property to be sold or foreclosed is a proprietary or under-proprietary tenure, or a share of such a tenure, the right to buy or redeem such property belongs in the absence of a custom

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to the contrary;—1st, to co-sharers of the sub-division (if any) of the tenure in which the property is comprised, in order of their relationship to the vendor or mortgagor; 2ndly, to co-sharers of the whole mahal in the same order; 3rdly, to any member of the village community; and, 4thly, if the property be an under-proprietary tenure, to the proprietor." Then follows the provision that where two or more persons are equally entitled to such right the person to exercise the same shall be determined by lot. According to the 3rd sub-division of this section, whether the property sold or foreclosed is a proprietary or under-proprietary tenure, any member of the village community may exercise the right of pre-emption. The constitution of the village community is disclosed in section 7 by the description of village communities as village communities "however constituted, and whether proprietary or under-proprietary;" that is, I take it, village communities consisting of proprietors or under-proprietors or partly of proprietors and partly of under-proprietors. The words "however constituted" are words of wide meaning and must not be lost sight of. Reading then the words "any member of the village community" in section 9 in connection with the definition or description of village communities contained in section 7, it appears to be reasonably clear that an under-proprietor is a member of the village community within the meaning of section 9. If this be so, then, according to section 9, whether the property to be sold or foreclosed is a proprietary or under-proprietary tenure, the right to buy or redeem belongs under the 3rd sub-division of this section to any member of the village community, that is, to any member whether he be a proprietor or an under-proprietor. According to the interpretation placed upon the section by the learned Additional Judicial Commissioner the words "any member of the village community" are to be construed according to circumstances as meaning, if the tenure sold is a proprietary tenure, a member of the village community who is a proprietor; but if the tenure sold is an under-proprietary tenure, then as meaning a member of the village community who is an under-proprietor. This appears to me to be a somewhat fanciful exposition of the section. The words of the Act are quite general and without qualification, namely, that whether the property to

be sold or foreclosed is a proprietary or under-proprietary tenure any member of the village community, that is, any proprietor or under-proprietor shall have the right to pre-empt. If the Legislature had intended that only members of the village community who were proprietors should have the right of pre-empting a proprietary tenure, and that only members of the village community who were under-proprietors should have the right of pre-empting under-proprietary tenures, the section in question would, I think, have been differently expressed.

The provisions in the 4th sub-division of the section, namely, "if the property be an under-proprietary tenure, to the proprietor" throw no light one way or other upon the question so far as I can discover.

For the foregoing reasons I would answer the questions submitted to us in the affirmative.

BLAIR, J.—This case has been referred to this Court by the Judicial and Additional Judicial Commissioners of Oudh under the provisions of the Oudh Court's Act (XIV of 1891) as amended by Act No. XVI of 1897. The point upon which the learned Judicial Commissioners differed was whether the plaintiff appellant was entitled to a decree in a pre-emption suit brought by him against the Court of Wards as vendors of certain property belonging to the Ramnagar estate and one Ram Rup as the vendee. The facts are simple. On the 16th of June, 1898, the defendant, Court of Wards, sold to the defendant, Ram Rup, together with other property, a certain mahal called Patti Sabal Shah included in the village of Paharpur. The property sold is a proprietary tenure, and the learned Judicial Commissioners are agreed that the plaintiff is the owner of an under-proprietary tenure in the village of Paharpur, situate in the same mahal or sub-division of a tenure as the property sold.

The right of the plaintiff, if he possess any, depends upon the provisions of sections 7 and 9 of Act No. XVIII of 1876, called the Oudh Laws Act. Section 7 enacts that "unless the existence of any custom or contract to the contrary is proved, such right (*i.e.* of pre-emption) shall, whether recorded in the settlement record or not, be presumed (*a*) to exist in all village communities, however constituted and whether proprietary or

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under-proprietary, and in the cases referred to in section 40 of the Oudh Land Revenue Act, and *(b)* to extend to the village site, to houses built upon it, to all lands and shares of lands within the village boundary and to all transferable rights affecting such lands." Section 9 classifies the persons who are entitled to pre-empt in the following words:—"If the property to be sold or foreclosed is a proprietary or under-proprietary tenure or a share of such tenure, the right to buy or redeem such property belongs, in the absence of a custom to the contrary, 1st, to co-sharers of the sub-division (if any) of the tenure in which the property is comprised in order of their relationship to the vendee or mortgagor; 2ndly, to co-sharers of the whole mahal in the same order; 3rdly, to any member of the village community; and 4thly, if the property be an under-proprietary tenure, to the proprietor." It is then provided that the claims of those of equal right shall be determined by lot.

It is manifest that as the property sold is an entire mahal, there are no co-sharers entitled to pre-empt under the first two classes set out in section 9. The plaintiff, if entitled at all, acquires his right "as a member of the village community" under the 3rd class. We have to decide whether, within the true intent and meaning of the words, "any member of the village community," is included for purposes of pre-emption upon the sale of a proprietary tenure a co-sharer of under-proprietary tenure. *Primâ facie* the words are inclusive of all co-sharers in the village, and unless restricted and modified by other provisions of the same or some other act *in pari materiâ* must be so read.

The learned Judicial Commissioners have agreed that, though the Act contains no explicit provision to that effect, villages including tenures of different kinds fall within the provisions of sections 7 and 9 of the Oudh Laws Act, 1876, and that question is therefore not referred to us. The village of Paharpur is such a composite village, the vendor holding a proprietary tenure, the person claiming to pre-empt an under-proprietary tenure. Apart altogether from the fact that what was sold was an entire mahal, the present plaintiff could in no case have been included in class 1 as a co-sharer of a tenure in which the property sold

was comprised; as to class 2, there are no co-sharers of the mahal sold. But a consideration of the definitions of those two classes appears to me to throw light upon the meaning of the words "any member of the village community" in class 3. The qualification required by class 1 is an interest in a "sub-division of the tenure" of the property sold, and among persons possessing such an interest the nearer relation has the prior claim. When we come to Class 2 we find that the interest in the "sub-division of the tenure" is dropped out, and the words defining the qualification are simply "co-sharers of the whole mahal." Persons possessing such qualification are entitled in the order of relationship as in the previous class. It would appear therefore that even in class 2 there is to be found no restriction of pre-emptive right arising from diversity of tenure.

Whether the words "member of the village community" are to be construed as equivalent to the words "co-sharer in class 2," subject only to the difference of the area in which the qualifying interest lies, it seems obvious that they can bear no narrower meaning. They seem large enough to cover possession of any or all of the various interests specified in section 7 of the Oudh Laws Act, and to confer on the body of persons entitled to pre-emption under class 3 a right in no way restricted by the diversity of the tenure sold from that which constitutes their interest in the village.

I have had considerable difficulty in putting upon the provisions of class 4 an interpretation consistent with what I hold to be the true intent and meaning of the definition in class 3. It seems to me, however, to refer to those cases which are plainly contemplated by the Act in which the constitution of the village does not include proprietors. I am therefore of opinion that the plaintiff is a "member of the village community" of Paharpur and as such entitled to pre-empt the property sold. That is my reply to this reference.

BURKITT, J.—This matter has been referred to this Court in consequence of a difference of opinion between the learned Judicial Commissioner and Additional Judicial Commissioner of Oudh.

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The question referred to us for an expression of our opinion is "whether the appellant in this case is a member of the village community, and as such has a right of pre-emption under clause 3, section 9 of Act No. XVIII of 1876." It is unnecessary for me to recapitulate the facts of the case. They will be found fully detailed in the judgments of the learned Chief Justice and my brother Blair. Suffice it to say that an entire mahal, the property of the Ramnagar estate, was sold by the Court of Wards on behalf of the proprietor of that estate to one Rup Ram. The plaintiff-appellant claims to be entitled to pre-empt that sale. It is found that the plaintiff is an under-proprietor in the mahal. The question for decision then is—does that status constitute him a "member of the village community" under the 3rd clause of section 9 of the Act and give him a right to pre-empt the sale made to Rup Ram?

The views which have commended themselves to the Additional Judicial Commissioner are very attractive and symmetrical. He holds that in the case of the sale of a proprietary tenure the words "member of the village community" mean a member of that community who possesses proprietary rights, and in the case of a sale of an under-proprietary tenure mean a member possessed of under-proprietary rights. He therefore holds that as the plaintiff here is an under-proprietor, and as that which is the subject of the suit is a proprietary tenure, the plaintiff is not a member of the village community, and is therefore not entitled to pre-empt the sale of that tenure. In support of his views the learned Additional Judicial Commissioner has set forth several arguments which I have most carefully weighed and considered. But it seems to me that before I could agree with the learned Additional Judicial Commissioner it would be necessary to read into clause 3 of section 9 of the Act many words which the Legislature has not thought fit to insert in it. The chapter on pre-emption is no doubt somewhat obscure, but still I think a reasonable interpretation can be put on it as it stands without resorting to any interpolations.

Now section 6 of the Act defines the right of pre-emption to be a right of certain persons "to acquire, in the cases hereinafter specified, immovable property in preference to all other

persons." These last few words are very important as indicating the scope and intention of the chapter. Then section 7 declares that such right *(i.e.* a right to acquire, in the cases hereinafter specified, immovable property in preference to all other persons) shall be presumed to exist in "all village communities, however constituted and whether proprietary or under-proprietary." The words "village community" are not anywhere defined in the Act, but the accepted rule in the Oudh Courts is that they include all persons having an interest in the village estate, whether as proprietors or as under-proprietors, if resident in the village. A village community may be wholly proprietary or wholly under-proprietary or may contain members of both classes. The under-proprietors, as a rule, will be residents of the village, but the proprietors may be residents of another district or of another province, and their only connection with the village may be the receipt of revenue from the under-proprietors. It is difficult to conceive of larger and more unqualified words than those which in section 7, clause *(a)* describe the persons who are to be presumed to possess the rights defined in section 6, namely, the words "all village communities, however constituted, and whether proprietary or under-proprietary."

I interpret those words to mean that the right defined in section 6 must be presumed to belong to every member of the village community, whether that community consists of proprietors or of under-proprietors or partly of both. It follows, therefore, in this case that the appellant being an under-proprietor is a member of the village community.

There remains the second part of the question put to us, namely, has the appellant "as such" (that is as a member of the village community) a "right of pre-emption under clause 3, section 9 of Act XVIII of 1876?" If the interpretation I have put on section 7 be correct, I am of opinion that in the present case under the 3rd clause of section 9 the plaintiff-appellant here is entitled to pre-empt. According to the interpretation for which the respondent vendee contends, the 3rd clause of section 9 must be read somewhat in this way, namely, "3rd, to any member of the village community who is a proprietor in the case of the sale or foreclosure of a proprietary tenure, and to

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any member who is an under-proprietor in the case of the sale or foreclosure of an under-proprietary tenure." I am not prepared to cut down the very large words used in section 7 by putting on them the restricted meaning suggested above, and to hold that, though the Legislature has given pre-emptive rights to "any member of the village community," a certain class of such members shall be competent to exercise those rights, not generally and in all cases, but only when a certain class of property is sold or foreclosed. To put such a meaning on clause 3 would, in my opinion, be an act of legislation, and not an interpretation of the law as it stands. Further, such an interpretation would to my mind be at variance with the scope and intention of section 6 to which I have already referred. The respondent vendee is a stranger to the village community, while the appellant is a resident under-proprietor and a member of that community. That being so, I think the latter must be considered to be such member for all pre-emption purposes under the pre-emption chapter of the Act, and should not merely be considered to be such when the property, the subject of pre-emption, happens to be an under-proprietary tenure. The interpretation I would adopt has, in the present case, the advantage of securing to the appellant the right I think him entitled to "in preference to all others," and also that of keeping out one who admittedly is a stranger to the village community.

No argument can, I think, be based on the provisions of the 4th clause of section. 9. That clause was probably enacted with a view to giving to an absentee landlord a right of pre-emption which he otherwise would not have possessed. It is not necessary to discuss that matter further.

For the above reasons I have come to the conclusion that the question put to us should be answered in the affirmative.

BY THE COURT.—Our opinion is that the appellant in this case is a member of the village community and as such entitled to pre-empt the sale. Let this reply be forwarded to the Judicial Commissioner of Oudh.

PRIVY COUNCIL.

P. C.
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May
1 and 2.
June 6.

SRI GOPAL (PLAINTIFF) *v.* PIRTHI SINGH (DEFENDANT).

[On appeal from the High Court at Allahabad.]

Res judicata—Civil Procedure Code, section 13, *Explanation II—Omission to set up mortgage bond as a defence in former suit—Subsequent suit on mortgage bond—Civil Procedure Code, section* 43—*Relinquishment of part of cause of action.*

Where, to a suit by a mortgagee on a mortgage bond of certain property, a prior mortgagee of the same property is made a party and omits to set up his prior charge and claim to have it redeemed, a suit subsequently brought by him for that purpose is barred by explanation II of section 13 of the Civil Procedure Code.

In the same way, if, being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead.

Quære—Can a mortgagee who has several mortgages on the same property treat them, with respect to the provisions of section 43 of the Civil Procedure Code, as separate causes of action, or must he bring one suit on all his mortgages?

APPEAL from a decree (10th November, 1897) of the High Court at Allahabad, dismissing an appeal from a decree (12th June 1894) of the District Judge of Aligarh, which had affirmed a decree (12th August, 1893) of the Subordinate Judge of Aligarh dismissing the appellant's suit.

One Maya Ram and his sons Nek Ram, Pirthi Singh and Ram Singh owned a large number of biswas in mauza Manai in the Aligarh district, and the suit arose out of proceedings consequent on a series of mortgage transactions entered into by the three sons after the death of their father. In 1868, 1869 and 1870 they executed mortgages of portions of mauza Manai in favour of one Phul Chand. From 1871 to 1876 five mortgages of portions of the same property were executed by them. Three of these mortgages were in favour of one Ishur Das: on 21st July, 1871, a mortgage of 4 biswas as security for Rs. 1,000; on 7th February, 1874, a mortgage of 4 biswas for Rs. 250, and on 16th July, 1874, a mortgage of 3 biswas 10 biswansis for Rs. 1,500. Nek Ram, Pirthi Singh and Ram Singh also executed on 30th August, 1872, a mortgage of 4 biswas of the same property to Murli

Present—Lords MACNAGHTEN and LINDLEY, SIR FORD NORTH, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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Singh and Sarnam Singh as security for Rs. 800; and on 18th August, 1876, a mortgage of 4½ biswas to Bhagwan Das, son of Phul Chand for Rs. 3,811. In this mortgage bond it was stated that the bonds executed in favour of Phul Chand in 1868, 1869 and 1870 had been received back by the mortgagors as being paid off.

Ishur Das died leaving two sons, Sita Ram and Daya Kishan, who, on 11th July, 1883, brought a suit (No. 121 of 1883) on the mortgage of 21st July, 1871, in which, on 3rd September, 1883, they obtained a decree for Rs. 3,565 and for sale in default of payment, and under that decree the 1¼ biswa share hypothecated was sold and purchased by the decree-holders. None of the other mortgagees were made parties to that suit.

On 15th August, 1883, Murli Singh and Sarnam Singh brought a suit (No. 142 of 1883) on their mortgage of 30th August, 1872, in which they obtained a decree on 17th December, 1883, for Rs. 1,852 to be enforced by sale against the mortgaged property, and on the sale they became purchasers of the same 1¼ biswas of mauza Manai. To this suit also none of the other mortgagees were made parties.

On 27th July, 1888, Daya Kishan having died, Sita Ram and Sri Gopal son of Daya Kishan brought a suit (No. 129 of 1888) for sale on Ishur Das' mortgage of 16th July, 1874, and obtained a decree on 26th September, 1888, in execution of which 1 biswa 7½ biswansis of the property were sold and purchased by Bechai Lal, another son of Phul Chand. None of the other mortgagees were parties to that suit.

Bhagwan Das assigned his mortgage of 18th August 1876 to one Shiam Lal, who sold it to Sri Ram, who, on 18th August, 1888, brought a suit (No. 150 of 1888) to enforce the bond, in which suit on Sri Ram's death his daughter Musammat Janki, the wife of Bechai Lal, was, as her father's assignee by gift, substituted for him as plaintiff. That suit was brought against the mortgagors, against the representatives of Ishur Das, and also against Murli Singh and Sarnam Singh. Janki claimed in that suit that as assignee of Bhagwan Das her bond took precedence over all the bonds created by Nek Ram, Pirthi and Ram Singh in favour of Ishur Das inasmuch as they were all subject to the hypothecations

in favour of Phul Chand which were satisfied by means of Bhagwan's money, but that claim was not allowed. The representatives of Ishur Das pleaded their prior rights under the mortgage of 21st July 1871, but made no mention of their mortgage of 7th February 1874, nor did they raise any question as to their rights under that mortgage. In that suit on 19th December, 1889, Janki obtained a decree for sale subject to her redeeming the mortgages of 21st July, 1871, 30th August, 1872, and 16th July, 1874.

On 24th September, 1888, Murli Singh and Sarnam Singh brought a suit (No. 166 of 1888) under section 92 of the Transfer of Property Act (IV of 1882) against Sita Ram and Sri Gopal, for redemption in respect of the 1¼ biswas which they had purchased in execution of the decree of 17th December, 1883, in their suit on the mortgage bond of 30th August, 1872, and on 25th July, 1889, they obtained a decree declaring their right to redeem the land from the prior mortgages on payment of the proportionate amount of the mortgage debt due to Sita Ram and Sri Gopal under the mortgage of 21st July, 1871. In that suit Sita Ram and Sri Gopal did not plead their rights under the mortgage of 7th February, 1874. On 1st May, 1892, when 4 biswas of mauza Manai was about to be sold in satisfaction of the decree in Sri Gopal's suit (No. 121 of 1883) on the bond of 21st July, 1871, on which there was then due Rs. 2,485, Kewal Singh and Ajola (or Rajola) as heirs of Nek Ram sold the property to Bechai Lal for Rs. 6,000, which was to be applied in satisfaction of the debt under that decree, and in part payment of Janki's claim under the bond of 18th August 1876. On the 20th June, 1892, Sri Gopal made the following application to have it notified that the property about to be sold was charged in respect of the bond of 7th February, 1874, as well as with that of 21st July, 1871:—

"A 2¾-biswa share out of 4 biswas in village Manai, pargana Akrabad, belonging to Nek Ram, deceased, and possessed by his heirs, has been advertised for sale to be held to-day in (satisfaction of) the applicant's decree, and the said property is hypothecated in the decree passed on the basis of the bond, dated 21st July 1871, the amount of which is Rs. 2,374, and in the bond, dated 7th February 1874, executed by the debtor's ancestor for Rs. 250. The amount of the principal and interest of the same is Rs. 2,010. A mention of the said

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decree and bond has been made in the application for execution of decree, but by way of precaution this application is made, praying that the aforesaid debts may be notified at the time of sale.

"This having been presented along with the original bond it is ordered—

"That the notification be made."

The suit (instituted on 12th April, 1893), out of which the present appeal arose was brought on the mortgage bond of 7th February, 1874, by Sri Gopal representative of the original mortgagee Ishur Das against (1) Pirthi Singh; (2) Kewal Singh, son of Nek Ram; (3) Ajola (or Rajola), widow of a brother of Kewal Singh, and (4) Gaura, widow of Ram Singh, as first party, defendants, representing the original mortgagors; and against (5) Bechai Lal, son of Phul Chand; (6) Janki, wife of Bechai Lal; (7) Murli Singh and (8) Sarnam Singh, as second party defendants representing the mortgagees under the other bonds. The plaintiff alleged that the bond of 7th February, 1874, had priority over all charges except that of Murli and Sarnam under their bond of 30th August, 1872, and he prayed *(a)* for a decree against defendants (1) to (6) for the amount due on the bond of 7th February, 1874, *(b)* for a decree for redemption against Murli Singh and Sarnam Singh and a reconveyance by them as receiving payment of what was due on their bond of 30th August, 1872, of the 1¼ biswas purchased by them; and *(c)* for a decree for sale of the 4 biswas share hypothecated by the bond sued on.

In answer to the suit Bechai Lal and Janki [defendants (5) and (6)] pleaded that it was barred by section 43 of the Civil Procedure Code because the bond of 7th February, 1874, had not been sued on with the other bonds; and that it was also barred by section 13 of the Code as that bond had not been relied on as a defence in that suit (No. 150 of 1888). Janki also made the same claim as to her bond of 1876 as had been decided against her in her own suit.

Murli Singh and Sarnam Singh [defendants (7) and (8)] relied on section 13 of the Civil Procedure Code as barring the suit. The other defendants did not appear. On 12th August, 1893, the Subordinate Judge dismissed the suit. He held that a person having several mortgages on the same property was bound to sue on all at once, and that the suit was barred by the Civil Procedure Code, section 43. He also held that the plaintiff could and

ought to have set up the bond of 7th February, 1874, as an answer to the suit brought against him by Murli Singh and Sarnam Singh (No. 166 of 1888), and by Janki (No. 150 of 1888), and that his suit was therefore barred by section 13 of the Civil Procedure Code.

Against that decision the plaintiff appealed to the District Judge of Aligarh, who, on 12th June, 1894, affirmed the decision of the Subordinate Judge on both points and dismissed the appeal.

The plaintiff preferred an appeal to the High Court, and a Bench of five Judges (EDGE, C.J. and BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) dismissed his appeal on 10th November, 1897. The judgment of the High Court is reported in I. L. R., 20 All., 110.

On this appeal

Mr. *Mayne* for the appellant contended that the suit was not barred by section 13 of the Civil Procedure Code. The suit brought by Murli Singh and Sarnam Singh (No. 166 of 1888) was brought by them as mortgagees of their bond of 30th August, 1872, to redeem the prior mortgage held by the appellant of 21st July, 1871. It was not a necessary defence to that suit, and it would have been no answer to it, to set up the appellant's mortgage now sued on. The decree obtained by Murli and Sarnam could not, and did not profess to, affect any rights other than those then in question. As to Janki's suit (No. 150 of 1888) the High Court's judgment now under appeal is based on a misapprehension of the nature of that suit. She was not seeking to sell the property subject to any prior mortgage, which was the relief granted to her. She only wanted a declaration that the mortgages of 1868, 1869 and 1870 which her charge of the 18th August, 1876, was executed for the purpose of paying off, were kept alive for the benefit of Bhagwan Das, and that her mortgage of 1876, though later in date than the other mortgages of 1871, 1872 and 1874, therefore created a prior charge on the property. This relief she claimed as against both the appellants' mortgages, and it was rejected against both, the judgment declaring that both mortgages had priority over her's and must be satisfied as a condition precedent to her selling the property on which they

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were a charge. This should have been stated in the decree; but the judgment, it is submitted, explains the decree. Janki has in fact never paid off the mortgages which, in terms of the decree, she had to do before she could sell the property under it; and her right to execute that decree was barred by limitation before the present suit was brought. It having been unnecessary for the appellant to set up his mortgage of 7th February, 1874, in the former suits, it is submitted that explanation II of section 13 of the Civil Procedure Code does not stand in the way of his present suit.

Mr. *G. E. A. Ross* for the respondents, Bechai Lal and Musammat Janki was not called upon.

1902, *June 6th*.—The Judgment of their Lordships was delivered by—

SIR FORD NORTH :—

This action relates to certain incumbrances created by Nek Ram, Pirthi Singh and Ram Singh, the owners of several biswas in the mauza Manai in the Aligarh district. One of them and the representatives of the other two are respondents on this appeal, and they are all included in the term "mortgagors".

The five following incumbrances on that property are material :—

Date of mortgage.	Amount.	Names of mortgagees.
	Rs.	
(1) 21st July, 1871 ...	1,000	Ishur Das.
(2) 30th August, 1872 ...	800	Murli Singh. Sarnam Singh.
(3) 7th February, 1874 ...	250	Ishur Das.
(4) 16th July, 1874 ...	1,500	Ishur Das.
(5) 18th August, 1876 ...	3,811	Bhagwan Das.

In 1883 Sita Ram and Daya Kishan (heirs of Ishur Das then deceased) commenced an action (No. 121 of 1883) on the bond of 21st July, 1871, against the mortgagors only; and on 3rd September, 1883, obtained a decree for payment, and, if necessary, for sale.

In the same year Murli and Sarnam Singh commenced an action (No. 142 of 1883) on the bond of 30th August, 1872, in which action also the mortgagors were the only defendants; and on the 17th December 1883 they obtained a like decree for payment and, if necessary, for sale. Under that decree 1¼ biswas of the mortgaged property were sold, and were purchased by Murli and Sarnam Singh.

In July, 1888, Sita Ram and the present appellant Sri Gopal (the son of Daya Kishan, who was then dead) commenced an action (No. 129 of 1888) against the mortgagors only under the charge of 16th July, 1874; and on 26th September, 1888, obtained a decree for payment and sale in default. Part of the mortgaged property was sold in execution of that decree, and was purchased by the respondent Bechai Lal.

The charge of 18th August 1876 in favour of Bhagwan Das was sold by him to Shiam Lal, and by him to Babu Sri Ram, the father of the respondent Musammat Janki; and it was afterwards transferred by him to her by way of gift.

In August, 1888, Sri Ram commenced an action (No. 150 of 1888) to enforce the charge of 18th August, 1876; but having died on the eve of the trial the name of his daughter the respondent Musammat Janki was substituted as plaintiff. The mortgagors, Sita Ram and the appellant, and Murli and Sarnam Singh, were all made defendants in that action. The plaintiff therein sought to establish that charge as having priority over the earlier mortgages above referred to upon the ground that the money thereby secured had been borrowed to pay, and had been applied in paying, certain other charges on the same property of still earlier date, all being prior to 1871; but this claim to priority broke down, the plaintiff having failed to satisfy the Court that the earlier charges had been kept on foot, or that the money had been so applied. The decree gave the plaintiff judgment for payment against the mortgagors; and declared that in default of payment she would be entitled to sell ¼ biswa of the land comprised in the mortgage sued on, which was free from all incumbrances; and could also sell the remaining four biswas of the mortgaged land after fully paying and satisfying the amount of the prior debts detailed at the foot of the judgment,

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viz., the bond in favour of Murli and Sarnam Singh, dated 30th August, 1872; and the bond in favour of Sita Ram and Sri Gopal dated the 21st July, 1871.

In the month of April, 1893, the appellant Sri Gopal as sole plaintiff (Sita Ram being then dead, and all the securities in favour of Ishur Das being then vested in him alone) brought this present action (No. 67 of 1893) to enforce the bond of 7th February, 1874, against the mortgagors, the respondents Bechai Lal and Musammat Janki, and the respondents Murli and Sarnam Singh, all of whom were made defendants. The defendants Bechai Lal and Musammat Janki pleaded *inter alia* that in the action No. 150 of 1888 the parties represented by the appellant did not set up the bond of 7th February, 1874, and that therefore this action was barred by section 13 of the Code of Civil Procedure; and this view was sustained by the Subordinate Judge of Aligarh in 1893; by the District Judge in 1894; and by the High Court of the North-Western Provinces in 1897. The latter Court said in its judgment:—"In our opinion not only might the representatives of Ishur Das have pleaded their mortgage of the 7th of February, 1874, but they ought to have done so; and if they had done so no decree for sale could have been made without these rights being protected by the decree. They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sri Ram, we are of opinion that section 13 of the Code of Civil Procedure applies."

The materiality of the mortgage here referred to is evident. If Musammat Janki's claim had succeeded to its full extent she would have established her priority over all the four bonds in question. As it was, she only established her claim subject to the specified securities of Sri Gopal and Murli and Sarnam Singh, which did not include the bond now sued on. The appellant would have been entitled to plead and prove this bond as a bar to any decree being made for sale except subject to that bond. Had he done so, it would have been included in the "details of liens" at the end of the decree, and the right of Musammat Janki would have been expressly subordinated to that charge also. The judgments are clearly right: and the appeal would have been unarguable, but for an ingenious point

raised by the appellant's Counsel. He set up at the bar (notwithstanding the statement in the appellant's case that no facts are in dispute) that all the Judges were mistaken in saying that this bond of February, 1874, was not set up by the appellant: that in fact it was set up, and that the decree was wrong in not dealing with it. But that decree might have been corrected, if not in accordance with the judgment: or appealed against, if both judgment and decree were wrong: and neither of these courses having been adopted their Lordships cannot go behind it. No pleadings in that action are before the Court, except the statement of Sita Ram, which does refer to the "bonds" (without saying what bonds) in his favour. It does indeed appear from the reasons given by the learned Judge that the existence of Sri Gopal's three bonds was within his knowledge; but for some reason the two later bonds were dropped; no issue was directed about either of them, although an issue (2) was directed as to the bond of 21st July, 1871; and the parties were apparently content that they should not be dealt with by the decree. That the matter was not overlooked is also indicated by the form of the appellant's notification of 20th June 1892(1). And all doubt upon the point is removed by paragraph 7 of the plaint in this action, in which the pleader, anticipating the defence that would be set up, endeavours to forestal it by saying:—"Musammat Janki had brought the claim for fear of the amount of the bond dated 21st July, 1871, and a finding was recorded in respect of the same. There was no other question in that case as to the other matters relating to the hypothecation of the plaintiff and his uncle Sita Ram." The appeal therefore fails entirely as to Musammat Janki.

With respect to Bechai Lal, it is difficult to see why he is brought here. The claim for personal payment against him is idle. All that he did was to purchase some of the property which was sold by auction under the decree in the action in which Sita Ram and Sri Gopal were plaintiffs (No. 129 of 1888). According to the conveyance to him this sale was made under the decree in the action No. 121 of 1883; but this is not material. In each of those actions the appellant or his predecessors in

(1) Ante, page 431.

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title were plaintiffs. In either case as against Bechai Lal the case entirely fails.

Then as to Murli and Sarnam Singh. The former died in 1897; but his representatives are before the Court as respondents.

Their position is somewhat different. Their mortgage of 30th August, 1872, was subject to the appellant's mortgage of 21st July, 1871; but paramount to his mortgages of 7th February and 16th July, 1874. Their decree against the mortgagors of 17th December 1883 (No. 142 of 1883) has been already mentioned: as also has the purchase by them under that decree of 1¼ biswas of the mortgaged property. Sita Ram and Daya Kishan, who had already obtained a decree (No. 121 of 1883) against the whole of the property under their prior charge, proceeded thereunder to sell, over the heads of Murli and Sarnam Singh the same 1¼ biswas which Murli and Sarnam Singh had purchased; and themselves became the purchasers of that property under their own decree. Thereupon in 1888 Murli and Sarnam Singh commenced an action (No. 166 of 1888) against Sita Ram and Sri Gopal alone: and on 25th July 1889 obtained a decree to the effect that notwithstanding the decree in the prior action, to which they were not parties, they were entitled to redeem the 1¼ biswas upon payment of such a proportion of the whole debt due to the defendants on their prior security as the 1¼ biswas bore to the whole property comprised in the security of 1871: and this having been paid by Murli and Sarnam Singh into Court a transfer to them of the 1¼ biswas was directed. In this action the appellant as owner of the charge of February 1874 might have set up that, though Murli and Sarnam were entitled to redeem his first charge, he by virtue of his second charge of 7th February, 1874, was entitled in turn to redeem them; and if this had been done he could have got then what he asks now, and the necessity for this suit would have been avoided, and the parties would have escaped this shocking multiplication of actions. Three Courts below have taken this view, and their Lordships see no reason to dissent from it.

There are other difficulties in the plaintiff's path to be removed before he could succeed against Murli and Sarnam Singh

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in this appeal. Among others section 43 of the Civil Procedure Code was held to be a bar to his suit in the two first Courts. The Court of appeal expressed some doubt whether that was correct. There might have been a nice question to be argued; but the appellant's Counsel did not open it, and did not even read the section to the Committee.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs of the respondents Bechai Lal and Musammat Janki, who alone defended this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *Pyke* and *Parrott.*

Solicitors for the respondents (5) and (6)—Messrs. *Thomson & Co.*

J. V. W.

REVISIONAL CRIMINAL.

1902
April 29.

Before Mr. Justice Knox.

EMPEROR *v.* BAL KISHAN.*

Act (Local) No. 1 *of* 1900 *(N.-W. P. and Oudh Municipalities Act) sections* 128*(c)*, 132—*Municipal Board, powers of—Bye-law—Bye-law held to be unreasonable and its enforcement refused.*

The English law as to the necessity of bye-laws being reasonable is applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India.

The Municipal Board of Naini Tal passed a bye-law under the powers conferred upon it by section 128, clause *(c)* of Local Act No. I of 1900 to the following effect, namely:—"No coolie, whether bearing loads or not, no servant except in attendance on his master, and no prostitute shall use the upper North Mall "(one of two parallel roads running along the north side of the Naini Tal lake) " at any time."

Held that, as regards the words " no servant, except in attendance on his master", this was under the circumstances an unreasonable bye-law; and the Court declined to give effect to it.

WITHIN the limits of the Naini Tal Municipality were two roads running along the north side of the lake parallel with each other, but at slightly different levels. The upper road was a fairly broad metalled road, on the north side of which were shops and houses; the lower was more of the nature of a foot-path

*Criminal Revision No. 136 of 1902.

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close down by the margin of the lake. The upper road was in fact used chiefly by the better classes of the inhabitants of the station; the lower road mostly by coolies. The two roads were known by the names, respectively, of the Upper and Lower North Mall. The Municipal Board of Naini Tal, purporting to act under the power conferred upon it by section 128, clause *(c)*, of the N.-W. P. and Oudh Municipalities Act, 1900, * passed, with the view of regulating traffic on the two roads above referred to, a bye-law, the material portion of which was as follows:—"No coolie, whether bearing loads or not, no servant, except when in attendance on his master, and no prostitute shall use the Upper North Mall at any time."

After the passing of this bye-law one Bal Kishan, a servant of one of the residents of Naini Tal, was found on the Upper Mall, not in attendance on his master, but apparently going on a message by his master's order. Bal Kishan was prosecuted under section 132 of the Municipalities Act and fined Rs. 15. His appeal was dismissed by the Sessions Judge, and he accordingly preferred an application in revision to the High Court.

Pandit *Sundar Lal*, for the applicant.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

KNOX, J.—One Bal Kishan, a servant, has been convicted of an offence falling under Rule No. 10 of Rules under section 128, clause *(c)* of the N.-W. P. and Oudh Municipalities Act, 1900, and been sentenced to pay a fine of Rs. 15. I am asked to revise this order, upon the ground that the Municipal Board had no authority in law under section 128, clause *(c)*, to frame a rule of this kind; further, because the rule was not necessary for the prevention of danger or grave inconvenience to the public; and thirdly, because the bye-law is unreasonable in itself. The bye-law in question runs as follows:—"No coolie, whether bearing loads or not, no servant, except in attendance on his master, and no prostitute shall use the Upper North Mall at any time." The

* This section (so far as is material to the present case) runs as follows:—

128. Any Board may, by rules—

(c) Provide for the regulation or prohibition of any description of traffic in the streets, where such regulation or prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public.

facts of the case are not questioned. They are very briefly that the petitioner, a servant, and not in attendance on his master, was found at 2 P. M., on the 13th August, 1901, walking with a letter towards Talli Tal along the Upper North Mall.

Now the power given to Municipalities under section 128, clause *(c)* of the N.-W. P. and Oudh Municipalities Act, 1900, is undoubtedly a very large and wide power, and therefore one to be exercised with great discretion. The Board is under it authorized to make rules for prohibiting any description of traffic in the streets of Naini Tal, where such prohibition appears to the Board to be necessary for the prevention of danger or grave inconvenience to the public. It is contended on behalf of the Board that as the law has made them sole arbiters of what is necessary for the prevention of danger or grave inconvenience to the public, and that as they consider the use of the Upper North Mall by a servant, except when in attendance on his master, and at any hour of the day and night, a matter of grave inconvenience to the public, there is nothing further to be said. If the matter be one of grave inconvenience, the proof of it must be an easy matter. It does not appear from the judgment, nor from any arguments addressed to me, wherein consists the grave inconvenience to the public of servants using the Upper North Mall. No inconvenience, grave or otherwise, was shown even in argument, nor is it apparent at first sight wherein the grave inconvenience lies. It is intelligible that strings of coolies bearing loads may be inconveniences, and might be, under certain circumstances, grave inconveniences to the public. But it is difficult to distinguish between the case of a servant carrying a letter, as in the present instance, and a person of similar position in life, say a carpenter or a blacksmith passing along the Upper North Mall. The servant would be under the bye-law, if it be a good bye-law, committing an offence; the independent carpenter or blacksmith would be committing none. Both are or are not doing acts of a precisely similar nature. All bye-laws and rules of the same nature have to be very carefully construed, and the invariable rule of law is that they are to be construed in favour of the subject. The rule of law prevailing in England that a bye-law may be examined in order to discover whether it is reasonable in

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itself is a very sound rule, and no authority has been shown to me confining such a construction to bye-laws in England. This is indeed conceded by the argument of the counsel for the Municipality, in that he contended that the present bye-law is not an unreasonable one. After fully considering all the arguments that have been addressed to me, it appears to me that the bye-law is not a reasonable one. The distinction made between a person who is a servant and a person of similar degree who is not a servant is both invidious and unreasonable. It would also appear that the bye-law, if strictly construed, would lead up to impossibilities. There are shops and places which abut immediately on the Upper North Mall. How is a servant at point *A*, abutting upon the Mall, to proceed to point *B*, similarly abutting on the Upper North Mall, without using the Upper North Mall for the purpose? The only answer given was, that the spirit of the bye-law must be looked to, not the strict letter. This Court has held on previous occasions that where such grave power as this is entrusted to Municipalities, it behoves them to be extremely careful in framing their bye-laws so as to leave no room for doubt as to what is meant by them.

There are certain remarks in the judgment which I cannot pass over as unimportant. The learned Magistrate who tried the case speaks of the case as being a trivial one, and adds, "but where it is well-known that defiance has been and is being offered to these rules, some fine must be imposed which would be held by the accused to be a real punishment." These remarks are distinctly out of place in a case where the evidence discloses no intention to act in defiance of the law. The act of the servant is in itself a harmless act; there is no evidence that he or any one else acted contumaciously. There is no presumption in law in favour of the existence of contumacy or wilful defiance. The learned Magistrate was wrong in making any such presumption. It was suggested that the case was a test case. If it be so, there is no defiance of law in instituting a test case.

I hold that the present rule is one which, as it stands, the Board had no authority to pass. It seems to me doubtful whether the passing of a servant along a road falls within the term

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"traffic." This point was, however, not argued, and my judgment proceeds upon the ground that grave inconvenience to the public has not been shown, and the rule, as it stands, is an unreasonable one. I confine my judgment to the immediate matter before me, *viz.*, the using the Upper North Mall by a servant not in attendance on his master. No other point in the bye-law arises for decision. I accordingly set aside the conviction and the fine, and direct the latter to be refunded.

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April 29.

Before Mr. Justice Blair.

IN THE MATTER OF THE PETITION OF BEHARI LAL.*

Criminal Procedure Code, section 145—*No decision come to by Magistrate as to party in possession—Application for revision at instance of party who could not in his own right be entitled to immediate possession—Practice.*

Held that where a Magistrate, after entertaining proceedings under section 145 of the Code of Criminal Procedure, had declined to make any order declaring one or other of the contending parties in possession, the High Court would not interfere in revision at the instance of a person who, though apparently the next reversioner to the estate, could for the time being have no possible right on his own behalf to present possession. *Laldhari Singh* v. *Sukhdeo Narain Singh* (1) and *Anesh Mollah* v. *Ejaharuddi Mollah* (2), distinguished.

THIS was an application in revision arising out of certain proceedings under section 145 of the Code of Criminal Procedure held before the Joint Magistrate of Moradabad. The facts as found by the Magistrate were as follows:—One Har Sahai Patak died, leaving a widow, but apparently no direct male heir. After his death a dispute arose about mutation of names. This ended in a compromise, whereby it was settled that the widow Musammat Chunno should be entered in the khewat as owner for her life-time, and that Behari Lal the grandson of the deceased should be entered as her manager. It was also clearly laid down that Musammat Chunno had not reserved the right to remove Behari Lal from his possession. Musammat Chunno granted leases of certain villages belonging to the estate to Ram Sarup and others, and this action of hers led to the

* Criminal Revision No. 229 of 1902.

(1) (1900) I. L. R., 27 Calc., 892. (2) (1901) I. L. R., 28 Calc., 446.

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initiation, at the instance of Behari Lal, of proceedings under section 145 of the Code of Criminal Procedure. The Magistrate relying upon certain rulings of the High Court at Calcutta declined to make any order on these proceedings, holding that such proceedings were bad *ab initio* as having been entered upon between parties who had not an actual proprietary right in the property in dispute.

Against this order of the Magistrate Behari Lal applied in revision to the High Court.

Mr. *W. M. Colvin*, for the applicant.

Mr. *B. E. O'Conor* and Munshi *Gokul Prasad*, for the opposite parties.

BLAIR, J.—This is an application to revise an order of a Magistrate made in proceedings under Chapter XII of the Code of Criminal Procedure. The circumstances are these. Har Sahai Patak, the owner of the property in dispute, died, leaving him surviving a widow and two sons of daughters. It is not disputed that under the ordinary law of inheritance the widow would take a life estate, and the daughters' sons' interest would open up upon her decease. It is alleged that the deceased, Har Sahai Patak, made a will, the validity and the provisions of which became the subject of dispute between the widow of Har Sahai and Behari Lal and others. It was concluded by a compromise, which defined the relations of the parties to be established from that moment. It provided that the widow should retain her life estate, but that Behari Lal should manage the property on her behalf, not, however, taking any steps with regard to it without her consent. The Magistrate made the order, having received information that a dispute dangerous to the public peace was likely to arise in respect of the possession of the property. These proceedings were set on foot by the present applicant in revision, Behari Lal. The Magistrate upon hearing the parties came to the conclusion that he could pass no orders, and accordingly no order was passed deciding the possession of either one side or the other of the disputants. He held that Behari Lal had in effect no *locus standi* to claim possession at all. He was an agent and manager, and had in himself no right to possession whatever. It is true that he had a reversionary

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interest, but that is a very different thing from being a person interested in the present possession of the property. It seems to me that Behari Lal is not entitled to be heard in revision, upon the ground that he is not a person concerned in the dispute as to possession. Whatever present right he has is a purely derivative one, and comes to him as agent for the widow, just as much as if there had been no compromise at all, and he had been chosen by the widow to act for her.

Two cases decided by the Calcutta High Court were cited, one that of *Laldhari Singh* v. *Sukhdeo Narain Singh* (1) and the other of *Anesh Mollah* v. *Ejaharuddi Mollah* (2). I think by both those cases the revisional jurisdiction of that Court has been extended to an extent which is beyond the practice of this Court. That, however, is unnecessary for me to decide, as they are not in point. In this case it is enough for me to say that the applicant Behari Lal has no *locus standi* in respect of the proceedings. For these reasons I reject his application.

APPELLATE CIVIL.

1902
May 1.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

TIKAM SINGH (PLAINTIFF) *v.* DHAN KUNWAR AND OTHERS (DEFENDANTS).*

Evidence—Legitimacy—Possible length to which the period of gestation may be protracted discussed.

Where a child born some 365 days after the last period at which he could have been begotten by the husband of his mother was set up as legitimate, it was *held* that although such a period of gestation was perhaps not absolutely beyond the bonds of possibility, yet there being evidence that the mother had been married to her husband for ten years without having had any children by him, and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child.

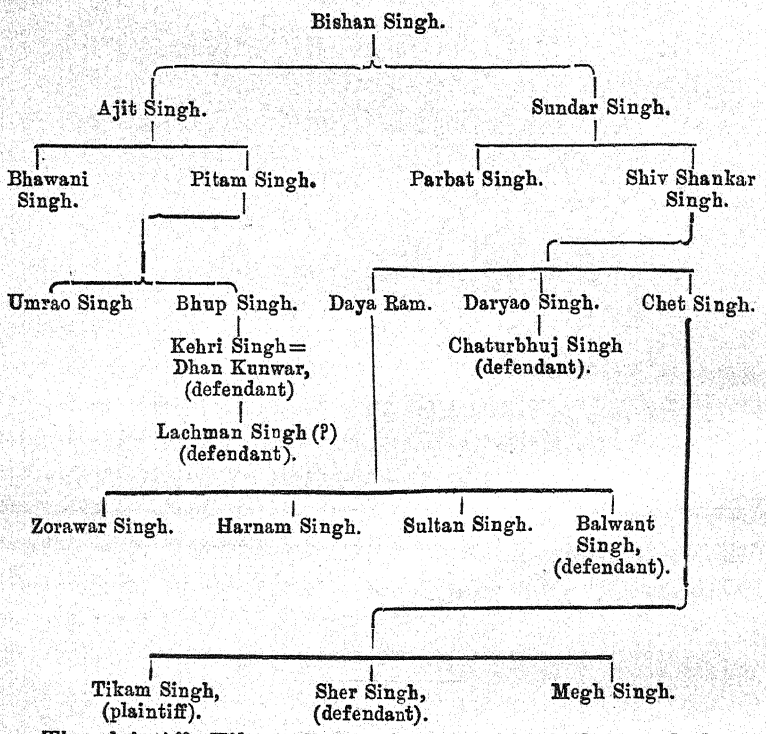
THE pedigree of the family to which both the plaintiff and the defendants belonged was as follows:—

* First Appeal No. 227 of 1899 from a decree of Munshi Rajnath Prasad, Subordinate Judge of Agra, dated the 16th November 1899.

(1) (1900) I. L. R., 27 Calc., 892. (2) (1901) I. L. R., 28 Calc., 446.

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The plaintiff, Tikam Singh, in his suit asked for a declaration that the defendant Lachman Singh was not the son and heir of Kehri Singh, deceased, and that the plaintiff was one of the nearest reversionary heirs of the said Kehri Singh.

The facts on which the plaintiff's case was based were as follows:—Kehri Singh died on the 15th of May, 1890, leaving the defendant, Dhan Kunwar, his widow, him surviving. The defendant, Lachman Singh, who was the son of Dhan Kunwar, was born on the 7th of May 1891, that is, 357 days after the death of Kehri Singh. The plaintiff alleged on that ground alone that Lachman Singh could not be the son of Kehri Singh, and further alleged that the moral conduct of Dhan Kunwar during the life-time of Kehri Singh was doubtful and that after the death of Kehri Singh she had become more or less notoriously immoral. The defendant, Dhan Kunwar, had been married to Kehri Singh for ten years at the time of his death, and had had no children during that period. She stated that Lachman Singh was the son of Kehri Singh her husband, the last intercourse

with whom she alleged to have taken place some eight or ten days before his death, and she denied any intimacy with anyone else except her husband.

The Court of first instance (Subordinate Judge of Agra) found upon the medical authorities and the evidence that the interval between the death of Kheri Singh and the birth of Lachman Singh did not render it impossible for Lachman Singh to be the lawfully begotten son of Kehri Singh, and that there was no sufficient evidence that Dhan Kunwar had become unchaste before the death of her husband or that she had been guilty of misconduct subsequently. The suit was therefore dismissed.

From this decree the plaintiff appealed to the High Court.

Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *D. N. Banerji* (for whom Dr. *Satish Chandra Banerji*), for the respondents.

STANLEY, C. J. and BURKITT, J.—This is an appeal from a decree of the Subordinate Judge of Agra dismissing the plaintiff's claim for a declaration that the defendant, Lachman Singh *alias* Mahar Singh, was not the son of one Thakur Kehri Singh, deceased. The plaintiff claimed as one of the reversionary heirs of Thakur Kehri Singh, who died on the 15th May, 1890, leaving the defendant, Thakurain Dhan Kunwar, his widow, him surviving. The defendant, Lachman Singh, who is the child of Thakurain Dhan Kunwar, was born on the 7th May, 1891, that is 357 days after the death of Thakur Kehri Singh. The plaintiff alleges that Lachman Singh is not the child of Kehri Singh, and charges that the moral conduct of Thakurain Dhan Kunwar during the life-time of her husband was doubtful, but that after his death she became immoral, and contracted improper intimacy with several persons whom we shall presently mention. The learned Subordinate Judge found that Lachman Singh was the legitimate son of Thakur Kehri Singh, and consequently dismissed the plaintiff's suit. He held upon the medical authorities and evidence that pregnancy might be protracted for the period which elapsed from the death of Kehri Singh to the birth of Lachman Singh, and that there was nothing in the evidence to lead him to suppose that Dhan Kunwar had, immediately after the

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death of her husband, become unchaste. The evidence of misconduct on the part of Dhan Kunwar adduced by the plaintiff he held to be unsatisfactory and unreliable. From this decree the plaintiff has appealed upon the ground that in view of the interval which elapsed between the death of Kehri Singh and the birth of Lachman Singh, Lachman Singh could not be the son of Kehri Singh, and that a finding to the contrary was against the weight of the evidence.

Thakurain Dhan Kunwar was cited by the Court for examination on the 4th January, 1896, at or about the time of settlement of issues, when she stated that except Lachman Singh she had no other issue by Kehri Singh, but that she had had miscarriages on two or three occasions. She says that there was coition for the last time between herself and her husband 8 or 10 days before his death, and that he was in a good state of health at that time; that she never had connection with any man except her husband, and that Lachman Singh was begotten by him. She did not tender herself for examination or cross-examination on the trial of the suit, notwithstanding that serious allegations of misconduct were made against her by several witnesses who were examined on behalf of the plaintiff.

The only question for our determination is whether or not Lachman Singh is the son of Kehri Singh. The answer to this question depends upon the weight which ought to be attached to the scientific and other evidence which has been given. According to the law in England and America, there is no period defined beyond which gestation cannot be protracted, although a period of 280 days appears to be accepted as the *legitimum tempus pariendi*. Each case in which legitimacy is contested must be decided on its own merits. Dr. Playfair in his valuable treatise on the Science and Practice of Midwifery, at p. 188, 9th edition, sums up his conclusion upon this question as follows:—"On the whole, it would hardly be safe to conclude that pregnancy can go more than three or four weeks beyond the average time. This conclusion is justified by the cases we possess in which pregnancy followed a single coitus, the longest of which was 295 days." He refers as examples of protraction of pregnancy to four instances recorded by Simpson, in which pregnancy extended

respectively to 336, 332, 319 and 324 days after the cessation of the last menstrual period; but he points out that in these, as in all cases of protracted gestation, there is the possible source of error that impregnation may have occurred just before the expected advent of the next period. Making an allowance, however, for this, he points out that even then we have a number of days much above the average, and admits that such cases of protracted pregnancy may be more common than is generally supposed. In the present case Lachman Singh was admittedly born 365 days after the last coitus with her husband alleged by his mother, that is nearly three months after the *legitimum tempus pariendi* had elapsed. Dr. Taylor in his well known work on Medical Jurisprudence, at p. 265, Vol. 2, 4th edition, writes as follows:—"In works on midwifery will be found authentic reports of cases in which gestation continued to the forty-first, forty-second, forty-third and even to the forty-fourth week. Murphy regards 301 days or forty-three weeks as the average limit of gestation (Obstet. Rep., p. 4). Lee met with a case in which he had no doubt that the pregnancy lasted 286 days, the labour did not take place until forty-one weeks after the departure of the husband of the lady for the West Indies (Med. Gaz., Vol. 31, p. 917). William Hunter met with two instances in which gestation was protracted until the forty-second week. Montgomery met with a case in which delivery did not ensue until between the forty-second and forty-fourth weeks (Med. Gaz., Vol. 19, p. 646)." And again he writes:—"There is no doubt a limit to gestation, but it is not in our power to fix it, hence we find obstetric writers of repute adopting periods which have no point of agreement among themselves. Some stop short at 280 days, others like Reid fix the maximum yet known at 293 days. Murphy allows from his experience at least 324 days, and Meigs considers that gestation may be continued to twelve months or 365 days." Dr. Lyon in his work on Medical Jurisprudence for India sums up the matter thus:—"On the whole, therefore, as regards the question what is the longest period which, in natural human gestation, may intervene between coitus and delivery—the form which the question under consideration assumes for forensic purposes—it may be stated that—

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(1) it may be regarded as proved that this may be 296 days;

(2) most authorities agree in considering that the interval may be as long as 44 weeks or 308 days: indeed in the Gardner Peerage case several eminent obstetricians gave it as their opinion that the interval might extend to, at any rate, 311 days;

(3) some authorities consider that the interval may extend to the forty-sixth week—315 to 322 days."

These then are the limits assigned by the best medical experience. We gather from the foregoing that the utmost which can be said is that it is not outside the bounds of possibility that gestation may be protracted for a period of 365 days, but that so protracted a period of gestation is in the highest degree improbable. A Miss Yerbury, who is an M. D., and who has been in charge of the Maternity Hospital at Agra for nine years, was examined in this case, and she expressed her opinion that the longest period of gestation is from 300 to 308 days. Dr. Wilcocks, Civil Surgeon of Agra, stated that the longest periods of gestation that have been admitted in America were 317 and 308 days, and that the ordinary period of gestation is 278 days. He would say that any period exceeding 317 days for gestation was impossible. Dr. Amullya Ratan Bysack, who is an Assistant Surgeon, and has been a lecturer in the Medical School at Agra from the year 1888, deposed that to his knowledge, personal or acquired by study, it is not possible that a legitimate child can be born to a woman 350 days subsequent to the death of her husband. On the other hand, two native gentlemen who practice as physicians have been examined on behalf of the defendant, and have deposed that pregnancy may be extended for more than a period of 12 months. One of them, Gauri Shankar, says that he treated a woman whose pregnancy lasted for more than 12 months, namely, the wife of one Hira Lal, who gave birth to a child 14 months after her pregnancy. He also mentioned the case of the wife of one Ude Kachhi, who was under his treatment, and also remained pregnant for more than twelve months. In cross-examination he states his means of knowledge in the case of the wife of Hira Lal as follows:—

"I came to know from the woman that the child had been born in 14 months," and then "I came to know from the child's father that it had been born in 14 months from the day of conception." In the other case he appears to have derived his knowledge from a statement made by the father. Little weight can be attached to examples of protracted pregnancy so loosely verified. The other witness, one Khurshaid Ali, said that a child might be born "after it had remained in the womb *for two years or more,*" and that one Thakur Daryao Singh, living in the district of Aligarh, had a son after one year and nine months. He also mentioned other instances of protracted pregnancy. In cross-examination he said that he came to know from Daryao Singh that his wife was pregnant for 12 months, and that he had mentioned this fact to him 16 years ago. He did not know the name of the Kachhi whom he referred to as having had a son after 13 months, and he admitted that the mother was not under his treatment. In another case which he gave as an illustration of protracted gestation, he says that it was through the mother that he had ascertained that she had been with child for 14 months. Such evidence as this appears to us to be of little value, if it is not absolutely worthless. Now having regard to the fact that no child was born alive to Kehri Singh by his wife Takurain Dhan Kunwar, and to the fact that Lachman Singh was not born until the period of 357 days had elapsed from the death of Kehri Singh, and 365 days at least from the last coitus, the story told by Dhan Kunwar appears to us highly improbable.

The case, however, does not rest with the medical evidence. Positive charges of misconduct have been made against Dhan Kunwar by the plaintiff. She is accused of having misconducted herself with no less than four persons who were in her service from time to time, namely, Durga Prasad, Bhulan Singh, Nasrat, and Bairi Singh. The defendants did not examine any of these persons. Nasrat was in Court at the trial, but was not examined. One Chameli, who had been in the service of Kehri Singh, and was also his mistress, deposed that she remained in the service of Thakurain for five or six years after the death of Kehri Singh. She says that the Thakurain had the usual monthly course twice after the death of Kehri Singh. This evidence was given with

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the object of showing that at the time of her husband's death she was not pregnant. She also said that she, at the bidding of the Thakurain, used to invite the four persons whom we have mentioned to the room of the Thakurain, and that they used to stay with her in that room. Her suggestion is that these persons had improper intimacy with the Thakurain, and thus Lachman Singh is the son of one of them. She is corroborated in her story by a witness Hardeo, who deposed that Bhulan Singh, Durga Prasad and Nasrat slept at night in the Thakurain's house. If the evidence of these witnesses be reliable, it is difficult to believe in the legitimacy of the defendant Lachman Singh. The learned Subordinate Judge discredited the evidence of Chameli and did not believe her statements, saying that she was herself a half prostitute and a dismissed servant of the Thakurain. If she was a woman of a loose character there is this to be said, that the Thakurain, retained a woman of such character in her service for a number of years, both before and after her husband's death, which would not be to her credit. The Subordinate Judge seems to have considered that the evidence of Chameli, that the four persons named by her were permitted to go inside the zanana, was true, for he excuses this by saying that "her (Dhan Kunwar's) husband being dead and there being no male member in her family to look after her affairs, and the collateral heirs of her husband not being on good terms with her, it is not suspicious if she being in greater need of their services than in the life-time of her husband, permitted them to come inside the zanana quarters." Two servants of the Thakurain, namely, Musammat Naulo and Musammat Kesar, contradicted the evidence of Chameli in some particulars, but we are not disposed to attach much importance to their evidence. A witness of the name of Kundan, who is in the service of the Thakurain, denied that any male person was allowed to go inside the female apartments. It is a remarkable thing, however, that not one of the four persons who were mentioned by Chameli as having visited and stayed at night with the Thakurain in her room was examined on behalf of defendants to deny the allegations made against them. Nasrat was present in Court, as we have said, and yet he was not called as a witness. Besides this

the Thakurain herself did not venture into the witness-box to deny the charges so made against her. It is true that she was examined by the Court at the time of the settlement of the issues, and that she then denied that she had improper familiarity with any person. This was, however, before the evidence of Chameli had been given, and she was not and could not be subjected to any cross-examination. It is difficult to understand how it came about, if her case be true, that she did not go into the witness-box and categorically deny the charges made by Chameli, and that she did not produce the persons who were alleged to be her paramours to corroborate her in her denial of misconduct.

The question for us to determine is not whether it is within the bounds of possibility that Lachman Singh was the child of Kehri Singh, but whether, upon the evidence, and having regard to the probabilities, the reasonable finding upon the issue of legitimacy is one in favour of the defendants. Now we have the fact that the defendant, Dhan Kunwar, had been married to her husband for ten years and had not had any child; that the defendant Lachman Singh was born 357 days after the death of Kehri Singh, and 365 days at least after the last coitus, that is, nearly three months after the ordinary period of gestation had elapsed; that grave charges of immorality were made against the Thakurain, which were not refuted by her or by the parties implicated. In the face of these facts it is difficult to find any ground for accepting the truth of the defendant's strange and improbable story. We have come to the conclusion that the finding of the lower Court is entirely erroneous, and that the only finding consistent with the evidence and the probabilities of the case is that the defendant Lachman Singh is not the son of Kehri Singh. The evidence leads irresistibly to this conclusion. We accordingly so find, allow the appeal, set aside the decree of the lower Court, and declare that the defendant Lachman Singh is not the son and heir of Thakur Kehri Singh, deceased, and that the plaintiff is one of the nearest reversionary heirs of Kehri Singh. The defendants Thakurain Dhan Kunwar and Lachman Singh must pay the costs of this appeal in this Court and also the costs of the suit in the lower Court.

Appeal decreed.

1902
May 5.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Blair.

EMPEROR *v.* HARPAL RAI.*

Act No. XI of 1878 *(Indian Arms Act), section* 19—"*Going armed*"—*The mere carrying of arms for purposes other than their use as such not an offence.*

One *C. N.*, a person entitled to possess and use fire-arms, gave a pistol to an acquaintance, who was not entitled to possess and use fire-arms, asking him to take it and get it repaired in a neighbouring town. This acquaintance gave the pistol to his father Harpal Rai, who was taking it into the town to get it repaired, when he was arrested, and charged with an offence under section 19 of the Indian Arms Act, 1878.

Held that Harpal Rai was under the circumstances guilty of no offence under the Arms Act.

The mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Arms Act. *Queen-Empress* v. *Alexander William* (1) *Queen-Empress* v. *Bhure* (2) and *Queen-Empress* v. *Tota Ram* (3) referred to.

THE facts of this case are briefly as follows:—

One Mr. Colin Nichols, a European British subject, and a resident of the district of Ghazipur, being the owner of a pistol which was in need of repairs, gave the pistol to the son of one Harpal Rai, that he might take it into the neighbouring town of Zamania and have it repaired there. The pistol was passed on to Harpal Rai, who was taking it to Zamania, when he was arrested, and charged with an offence under section 19 of the Arms Act, 1878. He was convicted by a Magistrate of the first class and sentenced to pay a fine of Rs. 5. Harpal Rai applied in revision to the Sessions Judge, who reported the case to the High Court for orders under section 438 of the Code of Criminal Procedure, with a recommendation that the conviction and sentence should be quashed, being of opinion that, having regard to the case of *Alexander William* (1), the conviction was erroneous.

On this reference the Assistant Government Advocate (Mr. *W. K. Porter*) appeared and laid before the Court two subsequent cases — *Queen-Empress* v. *Bhure* (2) and *Queen-Empress* v.

* Criminal Reference No. 248 of 1902.

(1) Weekly Notes, 1891, p. 208. (2) Weekly Notes, 1892, p. 221.
(3) Weekly Notes, 1894, p. 82.

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Tota Ram (1) in which the case of *Alexander William* had been considered.

The following order was passed on the reference:—

KNOX and BLAIR, JJ.—Harpal Rai has been found guilty of an offence under section 19 of the Arms Act. The learned Magistrate who has convicted him found on the evidence that on January the 9th one Mr. Colin Nichols gave a pistol to the son of Harpal Rai, and asked him to get it repaired for him in Zamania. As Harpal Rai was taking the pistol to the blacksmith in accordance with his instructions, he was charged with the offence of going armed with the aforesaid pistol. This Court has pointed out, first, in the case of *Queen-Empress* v. *Alexander William* (1) and again in the case of *Queen-Empress* v. *Bhure* (2) and again in *Queen-Empress* v. *Tota Ram* (3) that the mere temporary possession, without a license, of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Indian Arms Act of 1878. The learned Magistrate apparently thought that the principle that underlies these decisions was confined to the case of a servant carrying his master's gun, and had no application to a friend performing the same office for a friend. The essential of the offence is the going armed, that is, carrying a weapon with the intention of using it as a weapon when the necessity or opportunity arises.

It is difficult to understand how a pistol which was in need of repairs could be seriously looked upon either as a weapon of offence or defence.

Another difficulty which appears to have weighed with the learned Magistrate is that if this principle be accepted, the Arms Act would become a dead letter for district like Ghazipur.

The learned Assistant Magistrate is bound to follow the rulings of this Court, and not to hesitate because he conceives that their results will be, in his opinion, disastrous in some direction or other.

We set aside the conviction and sentence, and direct that the fine, if paid, be refunded.

(1) Weekly Notes, 1891, p. 208. (2) Weekly Notes, 1892, p. 221.
(3) Weekly Notes, 1894, p. 82.

1902
May 6.

MISCELLANEOUS CIVIL.

Before Mr. Justice Knox and Mr. Justice Blair.

SUKHDEO PRASAD (PLAINTIFF) *v.* LACHMAN SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 53—*Suit on a mortgage for sale or "any other relief to which the plaintiff might be entitled"—Subsequent prayer for money decree relinquishing claim for sale.*

The plaintiff, a mortgagee, came into Court asking for a decree for sale on his mortgage, or "any other relief to which the plaintiff might be entitled." The mortgage sued upon contained the usual covenant for payment, in addition to the further covenant that in default of payment proceedings might be taken against the mortgaged property. *Held* that there was nothing to prevent such plaintiff in the course of the suit relinquishing his claim for sale of the mortgaged property, and asking merely for a simple money decree. Such an amendment of the pleadings did not amount to a conversion of the suit into a suit of another and inconsistent character.

THIS was a reference by the local Government, based upon an application under section 17 of the Kumaun Rules for revision of an appellate judgment and decree of the Commissioner of Kumaun.

The facts of the case sufficiently appear from the order of the Court.

Pandit *Moti Lal Nehru*, for the applicant.

Babu *Satya Chandar Mukerji*, for the opposite parties.

KNOX and BLAIR, JJ.—In this case the final decree of the Commissioner has been referred to this Court for report and opinion under rule 17 of the rules for the administration of justice in the Kumaun district. The suit in which the decree and judgment were passed was an ordinary suit brought by a mortgagee, asking for the sale of property mortgaged under section 88 of the Transfer of Property Act. In his prayer for relief the plaintiff, in addition to the prayer for sale, added a prayer that "any other relief which the plaintiff may be entitled to may be granted, because the mortgaged property is at present under kham management." The suit was heard out, and had proceeded up to judgment and decree, when the plaintiff by a fresh application withdrew his prayer for sale of the mortgaged property and asked for a simple money decree. The

* Miscellaneous No. 19 of 1902.

Court of first instance granted a money decree. The Commissioner, however, in appeal set aside the decree; the only reason given in his judgment being that if the plaintiff had originally wanted a money decree he should have sued for it at first. It is admitted that the mortgage deed contains the usual covenant for payment, in addition to the further covenant that in default of payment proceedings will be taken against the mortgaged property.

We do not see on what grounds the prayer for a simple money decree can be refused. When the mortgage covenants were entered into both parties contemplated the possibility of a simple money decree; indeed the decree for sale pre-supposes and gives specific time for payment of the money, and it is only in default of payment that the sale can be resorted to.

One objection was taken by the learned vakil for the opposite party, which was to the effect that if we granted a simple money decree we should be practically allowing the plaintiff to alter his suit for sale into a suit of another and inconsistent character. We fail to follow this argument. Looking to the words in which the relief was couched, we are satisfied that the plaintiff all along asked for a simple money decree, if for any reason the decree against the property mortgaged were to prove ineffectual. No provision has been pointed out to us in the Transfer of Property Act, nor do we know of any, which forbids a simple money decree being granted under circumstances like these. Since hearing the arguments we have been furnished with an unreported case of this Court, Letters Patent Appeal No. 35 of 1901, *Lala Bishun Sarup* v. *Mangal Sen*, decided on the 15th February 1902,*

* The judgment in this case was as below :—

BANERJI and AIKMAN, JJ.—This is an appeal under section 10 of the Letters Patent. The suit was brought for sale upon a mortgage. It having been discovered that there was a prior mortgage upon the property, the plaintiff withdrew his claim against the property and asked for a simple money decree. It was contended in the appeal to this Court that the suit was of the nature cognizable in a Court of Small Causes, and therefore no second appeal lay. This contention was repelled by the learned Judge of this Court who heard the appeal, and has been repeated in the appeal before us. We are of opinion that the objection was rightly overruled. The jurisdiction of the Court depends upon the nature of the suit as brought and not upon the character

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and we find on looking into that case that the view which we now take is shared by two other Judges of this Court.

The decree of the Commissioner of Kumaun should be set aside, and that of the Court of first instance restored with costs in all Courts. Let this be the answer returned to the reference made to us.

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which it ultimately assumes. The suit as brought was clearly one which a Court of Small Causes could not entertain. Therefore a second appeal to this Court did lie. The mortgage upon which the suit was based was made by one Nand Lal, the uncle of the defendant appellant before us, and it was alleged by the plaintiff that Nand Lal and the appellant formed a joint Hindu family, of which Nand Lal was the manager. This allegation was denied by the appellant. The Additional Subordinate Judge of Saharanpur, from whose decree the second appeal to this Court was preferred, did not decide the issue whether Nand Lal and the defendant were or were not members of a joint Hindu family. He was of opinion that as the defendant was the legal representative of Nand Lal, the plaintiff was entitled to a decree for the amount of his claim, and to recover it from the property, if any, left by Nand Lal, deceased. In the judgment now under appeal our learned brother says:—"It has been found that the amount borrowed was borrowed by the deceased uncle as *karta* of the joint Hindu family, consisting of himself and his nephew." This, as we have shown above, is not correct. Our learned colleague goes on to say that, under the circumstances stated by him, the law of agency prevailed. This view is opposed to the ruling in *Muhammad Askari* v. *Radhe Ram Singh*, (1) in which it was held that the manager of a Hindu family is not in the position of an ordinary agent as representing the other members of the family. For the determination of the appeal preferred to this Court it was, in our opinion, necessary to have findings on the issues—(1) Whether Nand Lal and the defendant formed a joint Hindu family, and whether Nand Lal was the managing member of that family. (2) Whether the debt in question was incurred for the purposes of the joint Hindu family. We refer the above issues to the Court of first appeal under section 566 of the Code of Civil Procedure. The Court will try the above issues, taking such additional evidence as may be necessary. On receipt of the findings ten days will be allowed for objections.

(1) (1900) I. L. R., 22 All., 307.

APPELLATE CIVIL.

1902
May 9.

Before Mr. Justice Banerji and Mr. Justice Aikman.

DEBI DAT (PLAINTIFF) *v.* JADU RAI AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Mortgage—Liability of non-executant members on a mortgage executed by some only of the members of a joint Hindu family—Burden of proof.

In a suit for sale on a mortgage of the joint family property executed by the father and three of his sons, the plaintiff made defendants, besides the executants, the fourth son, who was a minor, and four grandsons, also minors. *Held* that the non-executant members of the family were properly arrayed as defendants to the suit, inasmuch as their own interests in the joint family property would be liable under the mortgage, unless they could show either that the mortgage debt was never incurred, or that it no longer subsisted, or that it was tainted with immorality. *Jamna* v. *Nain Sukh* (1) held to be no longer law. *Badri Prasad* v. *Madan Lal* (2), and *Nanomi Babuasin* v. *Modhun Mohun* (3), referred to.

THIS was an appeal arising out of a suit for sale brought by one Debi Dat upon a mortgage of joint family property executed by Jadu Rai, the father, and three of his sons, Gajadhar Lal, Birj Lal and Bhajan Lal. The bond was dated the 5th of November, 1895. In his suit the plaintiff arrayed as defendants not only the executants of the bond, but also Mul Chand a minor son of Jadu Rai, Raghu, Bhaggu and Narain minor sons of Gajadhar Lal, and Debi the minor son of Birj Lal. The Court of first instance (Subordinate Judge of Bareilly) decreed the suit as against the executants, but exempted Mul Chand and the other minors. The decree was against the interests of the executants only. The plaintiff appealed, urging that the Court of first instance was wrong in exempting the minors, and that it was not for the plaintiff to prove that the mortgage debt was incurred for family necessity; but, on the contrary, for the minor defendants to show that for one reason or another they were not liable for the debt incurred by their father and the other executants of the bond. The lower appellate Court (District Judge of Bareilly) overruled this plea and dismissed the appeal. The plaintiff thereupon appealed to the High Court, again raising the

* Second Appeal No. 950 of 1899, from a decree of C. L. M. Eales, Esq., District Judge of Bareilly, dated the 27th September 1899, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 27th April 1899.

(1) (1887) I. L. R., 9 All., 493. (2) (1893) I. L. R., 15 All., 75.
(3) (1885) I. L. R., 13 Calc., 21.

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question of the liability of the remaining members of the joint family other than the executants of the mortgage deed.

Pandit *Jwala Dat Joshi* and Pandit *Baldeo Ram Dave*, for the appellant.

Babu *Durga Charan Banerji*, for the respondents.

BANERJI and AIKMAN, JJ.—This was a suit for sale upon a mortgage dated the 5th of November, 1895, executed by the first four defendants, namely, Jadu Rai and his three sons. The other defendants are a son of Jadu Rai and the sons of Gajadhar and Birj Lal, defendants. These persons were joined as defendants, as they were members of a joint Hindu family with their father and grandfather, and it was sought to make the mortgaged property, which was the joint family property of all these persons, liable under the mortgage. The Courts below, relying on the ruling of this Court in *Jamna* v. *Nain Sukh* (1) have exempted from liability the shares of the defendant Mul Chand and the grandsons. The plaintiff has preferred this appeal. It is true that the ruling referred to above has not in express terms been overruled; but having regard to the later Full Bench ruling in *Badri Prasad* v. *Madan Lal* (2), and to the ruling of the Privy Council in *Nanomi Babuasin* v. *Modhun Mohun* (3), it can no longer be considered as law. The sons and grandsons of a mortgagor can only dispute the validity of the mortgage either on the ground that the debt was never incurred or is no longer in existence, or that it was tainted with immorality. None of these pleas were set up in this case. The plaintiff was therefore entitled to the decree which he had asked for. We allow the appeal and vary the decree of the Court below by decreeing the plaintiff's claim against the whole of the property comprised in the mortgage, and we fix the 9th of November, 1902, as the date by which the mortgage money must be paid. The appellant will have his costs in this Court and in the Courts below. We direct that our decree be drawn up in accordance with the terms of section 88 of the Transfer of Property Act.

Appeal decreed and decree modified.

(1) (1887) I. L. R., 9 All., 493. (2) (1893) I. L. R., 15 All., 75.
(3) (1885) I. L. R., 13 Calc., 21.

Before Mr. Justice Knox and Mr. Justice Blair.

1902
May 12.

BEHARI LAL (PLAINTIFF) *v.* RAM GHULAM AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 83, 84—*Mortgage —Repayment of money lent—Lender not bound to accept payment by instalments unless he has so agreed.*

Where no stipulation or covenant has been made between the contracting parties as to the repayment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments and he can claim that the whole sum due be paid at one and the same time.

On the 9th of May 1891 Narain Das and others mortgaged to Ganga Ram two shops and a share in mauza Silsanda. On the 9th of March 1892 the mortgagors sold the share in mauza Silsanda to Muhammad Azim Khan and others, and on that sale Rs. 660 were left with the vendees to be paid to the mortgagee in discharge of the mortgage of 1891. In March 1893 Ram Ghulam and others brought a suit for pre-emption against Muhammad Azim Khan and his co-vendees, and obtained a decree, which directed that a deposit of Rs. 881-5-0 was to be made by the pre-emptors to the credit of the vendees. In that amount the above-mentioned sum of Rs. 660 was included. On the 11th of July 1893 Ram Ghulam sent a post-card to Ganga Ram informing him that Rs. 660 had been paid into Court on his account. This money Ganga Ram declined to receive on the ground that the amount due to him was Rs. 773. On the 7th of December 1898, Behari Lal, as the representative of his father Ganga Ram, who was then deceased, instituted a suit against the mortgagors and the pre-emptors for recovery of a sum of Rs. 1,444, odd as due on the mortgage. The Court of first instance (Subordinate Judge of Farrukhabad) gave the plaintiff a decree for practically the whole of his claim. The defendants pre-emptors appealed, raising the plea that as they had paid into Court Rs. 660 and had given notice of that deposit to the mortgagee, no interest was thereafter due from them. The lower appellate Court (District Judge of Farrukhabad) held that as there was nothing in the mortgage deed which bound the mortgagors to repay the principal and interest in one lump sum within the

* Second Appeal No. 830 of 1899, from a decree of Pandit Sri Lal, District Judge of Farrukhabad, dated the 30th of August 1899, modifying a decree of Pandit Rai Indar Narain, Subordinate Judge of Fatehgarh, dated the 13th of April 1899.

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term of three years, and as the sum of Rs. 660 more than covered the principal sum secured by the deed, the mortgagee acted unreasonably in rejecting the deposit made under the orders of a competent Court and could not equitably claim interest upon the sum so deposited. That Court accordingly granted the mortgagee only the sum of Rs. 873-4-0, together with interest on Rs. 113-7-6.

Against this decree the mortgagee appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Munshi *Gulzari Lal*, for the appellant.

Pandit *Sundar Lal* and Pandit *Baldeo Ram Dave*, for the respondents.

KNOX and BLAIR, JJ.—Certain of the respondents had, on the 9th May, 1891, executed a bond, whereby they hypothecated two shops and a certain share in mauza Silsanda to the father of the present appellant. On the 9th of March, 1892, the mortgagor sold the share in mauza Silsanda to other parties, and left the sum of Rs. 660 out of the consideration money with the vendees, saying that it was to be paid to the appellant in satisfaction of the bond of 1891. In March, 1893, Ram Ghulam and others, who are also arrayed as respondents in this Court, brought a pre-emption suit against Muhammad Azim Khan and his co-vendees, and obtained a decree, which directed that a deposit of Rs. 881-5-0 was to be made by the pre-emptors to the credit of Azim Khan and others aforesaid. The sum of Rs. 660 is included in the amount of Rs. 881-5-0. Ram Ghulam, on the 11th of July, 1893, had sent a post-card to Ganga Ram, informing him that Rs. 660 had been paid into Court on his account. Ganga Ram declined to take this on the ground that the amount due to him was Rs. 773. Nothing further was done in the matter until the present suit was instituted by the representative of Ganga Ram, claiming to recover the sum of Rs. 1,444 odd as due on the mortgage. The Court of first instance gave a decree for Rs. 1,378, practically for all that the appellant claimed. The lower appellate Court gave force to the plea raised by the respondents Ram Ghulam and others, which was to the effect that as they had deposited Rs. 660, and had given notice of that deposit, no

interest was thenceforward due. The Court held that as there was nothing in the mortgage deed which bound the mortgagors to repay the principal and interest in one lump sum within the term of three years, and as the sum of Rs. 660 more than covered the principal sum secured by the deed, the appellant acted unreasonably in rejecting the deposit made under the orders of a competent Court, and he could not equitably claim interest upon the sum so deposited. It accordingly granted the appellant only the sum of Rs. 873-4-0, together with interest on Rs. 113-7-6.

The main plea urged before us is that the plaintiff was not bound to accept payment of part of the mortgage money, and not being so bound, he is entitled to interest and compound interest as if it had never been deposited. Neither on the part of the appellant nor of the respondents were we referred to any precedents either of English or of Indian law. The appellant took his stand upon the principle to be found in sections 83 and 84 of the Transfer of Property Act. It seems to us that where no stipulation or covenant has been made between the contracting parties as to payment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time. Such seems to us to be the principle which governs the payment of moneys lent in English law, and we know of no opposite authority in the Indian law. It is, moreover, in general accordance with the principles of contract law as laid down in Leake and other leading authorities. We might go further and say that on the principle of common sense a lender who wants to put his money to use would be obviously embarrassed if he were repaid a large amount in continual driblets, and we do not see why he should be compelled to undergo this loss. We accordingly set aside the judgment and decree of the lower appellate Court, and restore that of the Court of first instance, with costs in proportion to success and failure. This disposes of the objection under section 561.

The decree will contain provisions for payment within six months from this date.

Appeal decreed.

1902
May 14.

Before Mr. Justice Aikman and Mr. Justice Banerji.

GULAB KUNWAR (DEFENDANT) *v.* THAKUR DAS (PLAINTIFF).*

Civil Procedure Code, sections 556, 558, 591—*Appeal—Order for re-admission of appeal dismissed for default not capable of being used by the appellant as a ground of objection to the decree.*

An order under section 558 of the Code of Civil Procedure readmitting an appeal which had been dismissed for default under section 556 is not appealable; neither is it an order "affecting the decision of the case" which "may be set forth as a ground of objection in the memorandum of appeal" from the decree in the suit within the meaning of section 591 of the Code. *Chintamony Dassi* v. *Raghoonath Sahoo* (1), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* (for whom Munshi *Gokul Prasad*), for the appellant.

Dr. *Satish Chandra Banerji* (for whom Pandit *Mohan Lal Nehru*), for the respondent.

AIKMAN, J. (BANERJI, J., concurring).—This appeal arises out of a suit brought by the plaintiff-respondent upon two hundis drawn by Musammat Mohan Kunwar in favour of the plaintiff. Mohan Kunwar being dead the suit was brought against the defendant-appellant as her legal representative. The defence was a denial of the hundis. The Court of first instance (the Munsif of Agra) dismissed the suit, holding that the execution of the hundis was not proved. On appeal by the plaintiff the learned Subordinate Judge came to an opposite finding upon a consideration of the evidence, and holding that the hundis were proved, granted the plaintiff a decree for the amount claimed, to be recovered from the estate of Mohan Kunwar. Against this decree the present appeal has been filed. The first ground taken in the memorandum of appeal is admittedly one which cannot be supported. It is to the effect that the appellant is not liable in law for the payment of Mohan Kunwar's debt. The appellant has not been made personally liable, but only to the extent of any assets which Mohan Kunwar may have left, and which may be in the appellant's hands.

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* Second Appeal No. 157 of 1900, from a decree of Rai Bahadur Babu Baij Nath, Subordinate Judge of Agra, dated the 20th of January 1900, reversing a decree of Khwaja Abdul Ali, Munsif of Agra, dated the 19th of July 1899.

(1) (1895) I. L. R., 22 Calc., 981.

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The two remaining grounds impugn an order of the lower appellate Court, which, under the provisions of section 558 of the Code of Civil Procedure, restored the appeal, which it had dismissed for default under section 556. The law allows an appeal from an order refusing to grant an application under section 558 for the restoration of an appeal. But it does not provide for an appeal from an order granting such an application. The learned vakil relies upon section 591 of the Code of Civil Procedure. That section provides that, if a decree be appealed against, any error, defect or irregularity in an order not otherwise appealable affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal. We are of opinion that the meaning of the words in section 591 "affecting the decision of the case" is that it must be shown that the error, defect or irregularity has affected the decision of the case on the merits. In this view an order such as that complained against in this case is not an order contemplated by section 591. In so holding, we are borne out by the decision in the case of *Chintamony Dassi* v. *Raghoonath Sahoo* (1), with which we are in entire accord. For these reasons we dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1902
May 14.

MADAN MOHAN LAL (PLAINTIFF) *v.* DILDAR HUSAIN (DEFENDANT).*

Act No. XII of 1881 *(N.-W. P. Rent Act), section 23—Suspension of revenue and consequent suspension of rent—Lessee entitled to the benefit of suspension of rent.*

Held that when the Local Government, under section 23 of the N.-W. P. Rent Act, suspends payment of revenue, and when suspension of rent has in consequence been ordered, a lessee is entitled to the benefit of the latter suspension.

THIS appeal arose out of a suit for arrears of rent under clause *(a)* of section 93 of the North-Western Provinces Rent Act. The suit was based upon a lease granted by the plaintiff

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* Second Appeal No. 59 of 1900, from a decree of Khan Bahadur Mir Akbar Husain, District Judge of Allahabad, dated the 3rd of October 1899, confirming a decree of Babu Badri Nath, Assistant Collector, Allahabad, dated the 2nd of September 1899.

(1) (1895) I. L. R., 22 Calc., 981.

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to the defendant of a share in a certain village for three years, *viz.*, 1302 to 1304 Fasli. Various pleas were urged by the defendant, but more particularly a plea that he was entitled to have set off against the plaintiff's claim for rent certain sums remitted to the tenants in consequence of the action of the Local Government under section 23 of the N.-W. P. Rent Act. The Court of first instance (Assistant Collector) allowed this plea, and found as a matter of account that nothing was due to the plaintiff by the defendant. The lower appellate Court (District Judge of Allahabad) also took the same view and dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *E. A. Howard*, for the respondent.

AIKMAN, J. (BANERJI, J., concurring).—This appeal arises out of a suit brought by the plaintiff, who is appellant here, to recover from his lessee arrears of rent for the years 1303 and 1304 Fasli. The short question raised in this appeal is whether, when the Local Government, under section 23 of the Rent Act, suspends payment of revenue, and when suspension of rent has in consequence been ordered, a lessee is entitled to the benefit of the latter suspension. If he is, this appeal must fail. We are clearly of opinion that under the terms of section 23 the defendant lessee was entitled to suspension of payment of the money payable by him under his lease. The result is, that the finding of the learned District Judge, that at the date of the suit nothing was due from the defendant as to the first two instalments of rent, and that the suit as regards the remaining instalments of rent was premature, is correct. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1902
May 14.

RAGHUNATH PRASAD AND OTHERS (DEFENDANTS) *v.* KANIZ RASUL AND ANOTHER (PLAINTIFFS).*

Execution of decree—Civil Procedure Code, sections 320 et seqq.—Sale held by Collector, but afterwards set aside—Suit by auction purchaser to have sale confirmed—Limitation—Act No XV of 1877 (Indian Limitation Act), Schedule II, Article. 14.

In execution of a decree which had been transferred to the Collector for execution under the provisions of section 320 of the Code of Civil Procedure, certain immovable property was sold by auction on the 22nd of September, 1891. But the judgment-debtors applied to the Collector to have the sale set aside, and on the 30th October, 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. The order of the Collector setting aside the sale was on appeal confirmed by the Commissioner on the 4th of May, 1892. After the setting aside of the sale the judgment-debtors, on the 14th of December, 1891, with the permission of the Collector, mortgaged the bulk of property. The mortgage money was paid into Court in discharge of the decree, and satisfaction of the decree was entered up, and on the 21st of December, 1891, the execution case was struck off. On the 12th of September, 1894, the auction purchaser, who after the sale had been set aside had withdrawn the purchase money paid in by her, brought a suit to have the sale in her favour confirmed. *Held* that, inasmuch as the plaintiff's claim involved the setting aside of the Collector's order of the 30th of October, 1891, by which the sale to the plaintiff had been set aside, the suit was barred by limitation, having regard to article 14 of the second schedule to Act No. XV of 1877. *Malkarjun* v. *Narhari* (1) and *Banke Lal* v. *Jagat Narain* (2), referred to. *Ayyasami* v. *Sumiya* (3) and *Debi Charan* v. *Bari Bahu* (4) held not to be of effect since the ruling of the Privy Council in *Malkarjun* v. *Narhari*. *Moti Lal* v. *Karrabuldin* (5) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) and Babu *Durga Charan Banerji*, for the appellants.

Messrs. *Abdul Raoof* and *R. Malcomson*, for the respondents.

BANERJI, J.—The defendants Nos. 4 and 5 obtained a decree against the defendants Nos. 1, 2 and 3, and in execution thereof caused the immovable property of those defendants to

* Second Appeal No. 29 of 1900, from a decree of Syed Muhammad Ali, District Judge of Shahjahanpur, dated the 22nd September 1899, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 24th of March 1896.

(1) (1900) I. L. R., 25 Bom., 337.
(2) (1900) I. L. R., 22 All., 168.
(3) (1884) I. L. R., 8 Mad., 82.
(4) Weekly Notes, 1894, p. 78.
(5) (1897) I. L. R., 25 Calc., 179.

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be attached. That property being ancestral, execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure. On the 22nd of September, 1891, the property was sold by auction and was purchased by the present plaintiff. The judgment-debtors applied to the Collector to have the sale set aside, and thereupon, on the 30th of October, 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. This order of the Collector was confirmed by the Commissioner on appeal on the 4th of May, 1892. After the setting aside of the sale the judgment-debtors mortgaged, on the 14th of December, 1891, the bulk of the property, with the permission of the Collector, to the defendants Nos. 6 and 7. The money raised by this mortgage was paid into Court in discharge of the decree, and satisfaction of the decree was entered up, and on the 21st of December, 1891, the execution case was struck off as satisfied. On the day following that of the dismissal of the plaintiff's appeal to the Commissioner, she withdrew from Court the amount of sale proceeds which she had paid in. On the 11th of March, 1893, the defendant No. 9 obtained from the judgment-debtors a sale deed of a part of the property sold by auction. On the date on which the mortgage in favour of the defendants Nos. 6 and 7 was made, and on the date on which the sale to the defendant No. 9 took place, there was no subsisting sale in favour of the plaintiff of the property comprised in the said mortgage and sale. On the 12th of September, 1894, the plaintiff brought the present suit, and she asked that the sale in her favour of the 22nd of September, 1891, be confirmed, that the order of the revenue court setting aside the sale, in so far as it affected her rights, be declared ineffectual, and that possession of the property purchased by her be delivered to her. At the time she brought her suit the whole of the sale proceeds had, as stated above, been received back by her from the Court, and no part of it was either in deposit with the Court or was tendered by her for payment to the parties entitled to receive it. The Courts below have decreed the claim.

The first question which we have to determine in this appeal, which has been preferred by the mortgagees, the second purchaser

Daya Kishan and one of the judgment-debtors, is whether the claim was barred by limitation on the date on which it was brought. It is clear that it was brought after one year from the 30th of October, 1891, the date on which the sale in favour of the plaintiff had been set aside by the Collector. It was also beyond one year from the date on which the order of the Collector was confirmed by the Commissioner. It was contended on behalf of the respondent that the order of the Collector, dated the 30th of October, 1891, was not an order setting aside the sale. The order, as stated above, was passed on an application to set aside the sale and ran as follows:—"I will give the judgment-debtors a fresh chance, and hereby fix the 20th of December for a new sale." This order clearly implies that the sale which had already taken place was set aside. That being so, before the plaintiff could succeed in this suit, it was necessary for her to get the order of the Collector dated the 30th of October, 1891, out of her way. Whilst that order stands good, her suit for possession cannot be maintained. This principle was affirmed by their Lordships of the Privy Council in the recent case of *Malkarjun* v. *Narhari* (1). That was a case in which, after an auction sale had taken place, a suit was brought for the redemption of a mortgage. Their Lordships of the Privy Council observed at page 348:—"It is then necessary for the plaintiff to set aside the sale in order to clear the ground for redemption of the mortgage." Similarly it is necessary in this case for the plaintiff to set aside the order by which the sale in her favour was set aside by the Collector in order to clear the ground for her suit for recovery of possession. It is true that the plaintiff does not in so many words ask that the order of the Collector should be set aside, but she does pray for a declaration that the order be declared ineffectual, so far as it is prejudicial to her rights. That amounts in effect to a prayer to set aside the order of the Collector, and, as we have already said, without such a prayer and without having the order of 30th of October, 1891, set aside, the plaintiff cannot obtain a decree for possession. The order of the Collector is an order of an officer of Government in his official capacity, and as it is not an order to which

(1) (1900) I. L. R., 25 Bom., 337.

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any other article in schedule (ii) of the Limitation Act expressly applies, it falls within article 14 of that schedule. The suit is therefore one to set aside an order of an officer of Government in his official capacity not otherwise expressly provided for, and having been brought after one year from the date of the order, is barred by limitation. The learned counsel for the respondents referred to the ruling of the Madras High Court in *Ayyasami* v. *Samiya* (1), and the decision of this Court in *Debi Charan* v. *Bari Bahu* (2). Having regard to the ruling of the Privy Council to which we have referred above the observations made in those cases cannot be held to have any force. The learned counsel also referred to the ruling of the Privy Council in *Moti Lal* v. *Karrabuldin* (3). That case is clearly distinguishable from the present. That was a suit between two rival auction purchasers of the same property in execution of different decrees, and the question was whether a valid title was acquired by the second purchaser after the sale in favour of the first purchaser. In such a suit no question arose as to the setting aside of a sale or of an order of Court. In support of the view taken above I would refer to the dictum of the late learned Chief Justice Sir Arthur Strachey in *Banke Lal* v. *Jagat Narain* (4), which was a somewhat similar case. He observes :—"The previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order." For the above reasons I would allow this appeal, and setting aside the decrees of the Courts below, dismiss the plaintiff's suit with costs.

AIKMAN, J.—I am also of opinion that this appeal must succeed. In the first place, I agree with my learned colleague, for the reasons set forth by him, in holding that the plaintiff's suit was beyond time. In the next place, I hold that at the time the mortgagees took their mortgage and the appellant vendee bought a part of the property, there was nothing to prevent the judgment-debtors transferring the property in the manner in which they did, and the judgment-debtors were capable

(1) (1884) I. L. R., 8 Mad., 82.
(2) Weekly Notes, 1894, p. 78.
(3) (1897) I. L. R., 25 Calc., 179.
(4) (1900) I. L. R., 22 All., 168.

of conferring, and did confer, a good title by the deeds which they executed. In support of this view I would refer to what was said by the late learned Chief Justice Sir Arthur Strachey in the case of *Banke Lal* v. *Jagat Narain* (1), at page 174. His view is likewise entirely in accord with the principle of the decision of their Lordships of the Privy Council in the well-known case of *Nawab Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (2). I agree in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed, the decrees of the Courts below are set aside, and the plaintiff's suit is dismissed with costs in all Courts.

Appeal decreed.

REVISIONAL CRIMINAL.

1902
May 17.

Before Mr. Justice Blair.

EMPEROR *v.* NABBU KHAN.*

Criminal Procedure Code, sections 110 *et seqq.—Security for good behaviour —Power of Court to assign geographical limits within which the sureties required must reside.*

Held that a Court in ordering security for good behaviour to be given with sureties is competent to assign some geographical limits within which the sureties required must reside. *Queen-Empress* v. *Rahim Bakhsh* (3) referred to.

THE facts of this case were briefly as follows:—

Security for good behaviour was demanded of two persons, Nabbu Khan and Mosul Singh, residents of Mirzapur. After the usual proceedings they were ordered to furnish their own bonds for Rs. 500 each, with two sureties in Rs. 1,000 each, to be of good behaviour for one year. It was further ordered that the sureties should be resident within the limits of the Mirzapur Municipality. Against this order Nabbu Khan and Mosul Singh appealed to the District Magistrate, who declined to interfere. They thereupon applied in revision to the High Court, where it was contended that the Joint Magistrate had no power to specify in his order the place where the sureties must reside.

* Criminal Revision No. 268 of 1902.

(1) (1900) I. L. R., 22 All., 168. (2) (1887) L. R., 15 I. A., 12.
(3) (1898) I. L. R., 20 All., 206.

1902

EMPEROR v. NABBU KHAN.

Mr. *C. Dillon*, for the applicants.

The Assistant Government Advocate (Mr. *W. K. Porter*), for the Crown.

BLAIR, J.—In this case the Magistrate in binding over a person to be of good behaviour under section 110 and other sections, in prescribing the class of sureties required, has limited them to residents in the Municipal borough of Mirzapur. Having regard to the ruling of the late Chief Justice Sir John Edge, reported in I. L. R., 20 All., 206, and several rulings of the Calcutta Court to which my attention has been called, I find myself unable to say that it is not in the power of the Court in ordering securities to be given to assign some geographical limit within which such sureties must reside. It is obvious that sureties from a remote spot would not be in a position to keep an eye on or exercise any control over a person bound over. I think, however, in this case for reasons put before me, that the narrowness of the limit might impose upon the person to be bound over an inability to find sureties at all, and he might therefore be sent to prison because such persons who might be willing to become his sureties live some short distance beyond the Municipal limits.

I therefore modify the order of the Magistrate by adding to the words "to the limits of Mirzapur Municipality" the words "or to some place in the immediate neighbourhood." Let the papers be returned.

1902
May 27.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SITA RAM (DEFENDANT) *v.* CHINTAMAN (PLAINTIFF).*

Hindu law—Maharashtra School—Succession—Place of daughter in the list of heirs.

Held, that according to the Maharashtra school of Hindu law the daughter is a preferential heir to the widow of a predeceased brother's son, or to the adopted son of such widow, where no authority for the adoption has been given by the deceased husband of the adopter. *Nihalchand Harakchand* v. *Hemchand* (1) referred to.

* Second Appeal No. 43 of 1900 from a decree of R. Greeven Esq., District Judge of Benares, dated the 31st August 1899, reversing a decree of Kunwar Mohan Lal, Subordinate Judge of Benares, dated the 17th January 1899.

(1) (1884) I. L. R., 9 Bom., 31.

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SITA RAM v. CHINTAMAN.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the appellant.

Babu *Devendra Nath Ohdedar* and Dr. *Satish Chandra Banerji*, for the rospondent.

BANERJI and AIKMAN, JJ.—The suit out of which this appeal has arisen relates to certain money left in the firm of a banker of Benares by one Sita Ram Dikshit, a Marattha Brahmin governed by the Maharashtra school of Hindu law. He had two sons, Bishan Dikshit and Gobind Dikshit, both of whom pre-deceased him. Musammat Parbati is the widow of Bishan Dikshit, and Musammat Annapurna is the widow of Gobind Dikshit. Chintaman, the plaintiff, was, adopted by Musammat Annapurna after the death of her husband. Before that Musammat Parbati had adopted Sita Ram, the appellant before us, who is the son of Salu Bai, the daughter of Sita Ram Dikshit. Salu Bai is admittedly alive. Chintaman claims a half share of the money by virtue of his adoption by Musammat Annapurna.

The suit was dismissed by the Court of first instance, but decreed in appeal by the lower appellate Court. It is conceded that by virtue of the adoptions made by the two daughters-in-law of Sita Ram Dikshit, the adopted sons could inherit only such property as had vested in their adoptive mothers, the adoptions not having been made under the authority of their respective husbands. We have therefore to see whether any portion of the estate of Sita Ram Dikshit passed to Musammat Annapurna, the plaintiff's adoptive mother. It was contended on behalf of the defendant that Salu Bai the daughter of Sita Ram being alive, she was the heir to Sita Ram's estate, and that no part of that estate passed to any of the daughters-in-law of Sita Ram. In our opinion this was a valid contention. The learned Judge of the lower appellate Court was of opinion that under the Maharashtra law a daughter-in-law excludes a daughter, and the reason upon which the learned Judge came to that conclusion was that the daughter being a *bhinna gotra sapinda*, and the daughter-in-law a *gotraja sapinda*, the latter takes precedence over the former. The learned Judge is wrong in thinking that the daughter

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SITA RAM v. CHINTAMAN

succeeds to her father by reason of her being a *bhinna gotra sapinda*. Under the Mitakshara and the Mayukha, which is the paramount authority in the Maharashtra school, the daughter has a fixed place in the order of succession. She comes immediately after the widow, and takes precedence over such *gotraja sapindas* as come after the brother's son. As Mr. Mayne observes at page 771 of his work on Hindu law, sixth edition:—"In Bombay the widows of *gotraja sapindas* stand in the same place as their husbands, if living, would respectively have occupied, subject to the right of any person whose place is specially fixed, as a sister, mother, or the like." The learned Judge has overlooked the important qualification set forth in the concluding portion of the sentence quoted above. We may also observe that the Bombay High Court has held in *Nihalchand Harakchand* v. *Hemchand* (1) that the sons of a separated brother inherit in preference to the widow of the son of an undivided brother, and the learned Judges remark:—"The members of the 'compact series' of heirs specially enumerated take in the order in which they are enumerated (Mayukha Chapter IV, section VIII, 18) preferably to those lower in the list, and to the widows of any relatives, whether near or remote, though where the group of specified heirs has been exhausted, the right of the widow, is recognised to take her husband's place in competition with the representative of a remoter line." This is a clear authority for holding that a daughter must have precedence over the widow of a deceased son who is not enumerated as one of the heirs and only comes in as a *gotraja sapinda*. The learned vakil for the respondent has referred to a passage in the Vaijayanti by Nanda Pandit as supporting the view of the learned Judge. We cannot regard that work as of any authority in comparison with the Mayukha, which, as we have said above, is the paramount authority in the Maharashtra school. He also cited to us a judgment of the Bombay Sudder Dewani Adalut of 1822. No reasons have been given in that judgment for the conclusion at which the Court arrived, nor is any authority cited.

The result is that the daughter of Sita Ram being alive, no portion of his estate vested in Annapurna, and by adopting

(1) (1884) I. L. R., 9 Bom., 31.

Chintaman the plaintiff she could convey to him no interest in Sita Ram's estate. We allow the appeal with costs, and, setting aside the decree of the lower appellate Court with costs, restore that of the Court of first instance.

Appeal decreed.

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SITA RAM v. CHINTAMAN.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

AMIR KAZIM AND ANOTHER (DEFENDANTS) *v.* DARBARI MAL AND OTHERS (PLAINTIFFS).*

1902 *May* 1.

Civil Procedure Code, section 316—*Execution of decree—Sale in execution—Time from which the auction purchaser's title accrues.*

When immovable property is sold in execution of a decree the title of the auction purchaser to mesne profits or possession does not accrue until the sale has been confirmed. *Gobind Ram* v. *Tulsi Ram* (1) and *Prem Chand Paul* v. *Purnima Dasi* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellants.

Pandit *Madan Mohan Malaviya*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The facts of this case are few and simple. One Ganeshi Lal was the owner of a village called Benipur. He mortgaged 15 biswas of the village to the plaintiffs on the 21st of March, 1892. Subsequent to this mortgage the entire village was sold at the instance of a creditor under a simple money decree on the 21st of September, 1896, and was purchased by the defendant Lakhpat Rai. Subsequently, on the 27th of January, 1897, the mortgagees instituted a suit for the sale of the 15 biswas of the village on foot of the mortgage of the 21st of March, 1892, and to this suit they made Lakhpat Rai a party. A decree was passed on the 5th of May, 1897. Before, however, the decree was obtained, namely, on the 27th of April, 1897, Lakhpat Rai granted a lease of the village to the defendants, Amir Kazim and Mohan Lal, for a term of ten years, at a rent of Rs. 1,800, and under this lease the defendants went into possession. After the date of the lease, namely, on the 20th of September, 1897, the 15 biswas share of the village was sold in execution of the decree of the 5th of May,

* First Appeal No. 3 of 1900 from a decree of Lala Anant Prasad, Subordinate Judge of Moradabad, dated the 19th September, 1899.

(1) Weekly Notes, 1887, p. 217. (2) (1888) I. L. R., 15 Calc., 546.

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1897, and was purchased by the plaintiffs, who were the mortgagees. On the following 23rd of November, 1897, the sale was confirmed and a certificate granted.

The present suit was instituted by the purchasers against Lakhpat Rai and his lessees and others to set aside the lease of the 27th of April, 1897, for recovery of possession of the property and for mesne profits, the plaintiffs' case being that, inasmuch as the lease was granted during the pendency of the suit, it was not binding on the plaintiffs. It is admitted that, having regard to the provisions of section 52 of the Transfer of Property Act, it was not binding, and that the lease was properly set aside. The only two points which have been argued in appeal before us are, that the learned Subordinate Judge was in error, first, in calculating the mesne profits to which the plaintiffs are entitled from the date of the sale instead of from the date of the confirmation of the sale and grant of certificate; and, secondly, in awarding to the plaintiffs mesne profits calculated upon the basis of the recorded rental of the property instead of upon the actual receipts of the defendants lessees, or the amount of rent which they might have received if they had exercised due diligence.

That the plaintiffs are only entitled to mesne profits from the date of the certificate, appears to us to be clear beyond any question upon the provisions of section 316 of the Code of Civil Procedure. That section provides that when a sale of immovable property has become absolute, the Court shall grant a certificate to the purchaser, and that such certificate shall bear the date of the confirmation of the sale, and, so far as regards the parties to the suit and persons claiming through or under them, *the title to the property sold shall vest in the purchaser from the date of such certificate, and not before.* Words could not express more clearly the intention that a purchaser is only to be entitled to possession or to the rents and profits from the date of his obtaining a certificate. A number of authorities, however, have been quoted to us in order to show that, notwithstanding the clear and express provisions of the section, the purchaser under an auction sale acquires some equitable interest in the property, which will entitle him to mesne profits, not merely from the date on which his title accrues, but from the date on which

the purchase is made. We do not say that there may not be some equitable rights arising out of such a purchase, which could be enforced notwithstanding the provisions of this section, but what appears to us to be abundantly clear is, that the title to mesne profits (or possession) does certainly not accrue until the sale has been confirmed. If an authority for this were required, it is to be found in a decision of this Court reported in the Weekly Notes of 1887, p. 217, in the case of *Gobind Ram* v. *Tulsi Ram*. In that case Mr. Justice Brodhurst and Mr. Justice Mahmood, on an application to recover mesne profits by way of damages for a period anterior to the obtaining of a certificate of sale, held that "the plaintiffs appellants as auction purchasers had no title to the property before the sale was confirmed." "This view," the learned Judges say, "is borne out by the express provisions of section 316 of the Code of Civil Procedure, which regulates questions of this kind. The plaintiffs having no right to the property before the confirmation of the sale, they could not sue for the recovery of the mesne profits thereof in the nature of damages," etc. In the case, decided in the High Court at Calcutta, of *Prem Chand Paul* v. *Purnima Dasi* (1) Mr. Justice Norris, in dealing with this section, says:—"I think, having regard to the provisions of section 316 of the Code of Civil Procedure, that this contention is not sustainable," (that is the contention that a title dated back beyond the date of the certificate). "It has been urged that, although the section says that 'the certificate shall bear the date of the confirmation of sale, and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before,' yet as regards third parties the property vests in the purchaser from the date of sale. No doubt the Legislature does not introduce the words 'third parties' but if, as regards the parties to the suit and persons claiming through or under them, the title of the purchaser is not to be considered complete, nor the property to vest in him until the confirmation, we see no reason for holding that, as regards third parties, the title of the auction purchaser is complete, and the property vested in him

(1) (1888) I. L. R., 15 Calc., 546.

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before the date of the confirmation of the sale." We fully concur in the view taken by the learned Judges in these cases. Several cases have been cited in which it appeared that the Court had not granted the certificate at the time of confirmation, in fact had failed to perform the duty cast upon it by the Legislature, and notwithstanding mesne profits had been allowed from the date of confirmation of sale; but we do not think that the decisions come to in cases of that kind govern cases such as the present. For these reasons we must modify the decree of the learned Subordinate Judge, and dismiss the claim for mesne profits between the 20th September, 1897, and the 23rd November, 1897, the date on which the sale was confirmed and the certificate was granted.

The other question for our determination is in respect of the calculation of mesne profits. The learned Subordinate Judge has allowed the plaintiffs as mesne profits the entire amount of the rental of the property irrespective of the consideration whether the entire amount was collected or not, or might, with reasonable diligence, have been collected, and this he has done by way of penalty, as he states "by reason of the improper conduct of the lessees in accepting the lease of the property, and in keeping the plaintiffs out of possession." We have asked the learned counsel for the respondents if he could point out to us any evidence in the case going to show that the lessees were guilty of either collusive or fraudulent conduct, and we have been unable to elicit from him anything to satisfy us that they were guilty of such misconduct. The learned Subordinate Judge, in issue No. 6, in which he decided that Lakhpat Rai, the lessor, granted the lease at an undervalue, and granted it collusively, does not venture to state that the lessees colluded with him, or acted wrongfully in the matter, nor does he show that the lessees had any knowledge of the pending suit. The rent which they are paying under the lease is a substantial rent. It may not be, having regard to the evidence, a full rent. This, however, does not justify, as it seems to us, the penalising of the lessees by exacting from them rents and profits which they may not have received. Section 211 of the Code of Civil Procedure explains what mesne profits should be awarded in a case of this kind, *i. e.*,

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in suits for recovery of possession of immovable property, as follows—"Mesne profits mean those profits which the person in wrongful possession of such property actually received, or might, with ordinary diligence, have received therefrom together with interest on such profits." We have not materials before us to enable us to say what amount should be allowed for mesne profits in this case; and moreover we do not know when the plaintiffs got possession of the disputed property. We shall, therefore, leave the actual amount of profits to which the plaintiffs are entitled for the determination of the execution department, directing attention, however, to the true criterion for estimating the mesne profits as laid down in section 211. In calculating such mesne profits the execution department should not award the gross rental of the property unless it is satisfied that the entire rental was received by the lessees defendants, or with ordinary diligence might have been received by them. We may also point out that the ordinary collection expenses ought to be allowed to the defendants in this case, if any have been incurred. We accordingly so far modify the decree of the Court below with costs.

Decree modified.

Before Mr. Justice Banerji and Mr. Justice Aikman.

1902
May 28.

DEBI PRASAD (DECREE-HOLDER) *v.* JAI KARAN SINGH AND OTHERS (JUDGMENT-DEBTORS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 88, 89—*Mortgage—Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment.*

In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court. *Held*, that the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. *Nihali* v. *Mittar Sen* (1), *Raham Ilahi Khan* v. *Ghasita* (2), and *Sita Ram* v. *Madho Lal* (3), referred to. *Ram Lal* v. *Tulsa Kuar* (4) distinguished.

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* Second Appeal No. 378 of 1900 from a decree of H. E. Holme, Esq., District Judge of Azamgarh, dated the 26th January 1900, confirming a decree of Munshi Rai Izzat Rai, Munsif of Azamgarh, dated the 18th November 1899.

(1) (1898) I. L. R., 20 All., 446.
(2) (1898) I. L. R., 20 All., 375.
(3) (1901) I. L. R., 24 All., 44.
(4) (1896) I. L. R., 19 All., 180.

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THE facts of this case sufficiently appear from the first order of remand made by the High Court.

Munshi *Kalindi Prasad*, for the appellant.

Munshi *Gokul Prasad* (for whom Babu *Sital Prasad Ghosh*), for the respondents.

AIKMAN, J.—The appellant got a decree for sale under the provisions of section 88 of the Transfer of Property Act. The decree was for sale on redemption by the appellant of two prior mortgages, one simple and one usufructuary. He paid into Court certain sums for satisfaction of the prior mortgages, and applied for the sale of the property. The Court of first instance disallowed his application on the ground that the payments by him had not been made within the time prescribed by the decree. The decree-holder appealed. The learned District Judge dismissed his appeal, although not on the ground upon which the Court of first instance had proceeded. The learned District Judge states that the decree-holder had paid the principal only of the two prior mortgages. It is admitted by the vakil for the respondent that the learned Judge has fallen into error as regards one of the mortgages, *viz.* the simple mortgage, inasmuch as the record shows that the appellant paid not only the principal, but also the interest due upon that mortgage. With regard to the usufructuary mortgage, the learned Judge says that the mortgagee had possession in lieu of interest, and he appears to be under the impression that so far as the usufructuary mortgage is concerned the appellant decree-holder had paid all that was due under it. This is not admitted by the respondent. It is stated that there is still a considerable sum due to the usufructuary mortgagee on account of interest. In order to enable me to dispose of this appeal, I find it necessary to refer to the lower appellate Court the following issue for trial under the provisions of section 566 of the Code of Civil Procedure, *viz.*, whether the amount paid by the decree-holder, Lala Debi Prasad, was sufficient to discharge the amount due under the prior usufructuary mortgage. On the return of the finding, ten days will be allowed for objection.

[A return was made to this reference that the decree-holder had paid all that was due under the two prior mortgages. But it was argued that the

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decree-holder, not having paid the amount which he had to pay within the time limited by the decree, had lost the right to redeem the prior incumbrances. A further reference was therefore made to the lower appellate Court as to whether the appellant, on or before the 30th July, 1899, had tendered to the prior mortgagees, defendants 2 and 3, the amount due under their mortgages. It was found that the decree-holder had not tendered the amount due on the prior mortgages on or before the 30th of July 1899, but had deposited it in Court after the period limited by the decree had expired. On the question whether the decree-holder could avail himself of the deposit so made, the appeal was referred to a Division Bench, by which, on the 28th May, 1902, judgment was delivered as below.]

BANERJI and AIKMAN, JJ.—The ruling in *Ram Lal* v. *Tulsa Kuar* (1) is distinguishable from the present case. Besides, the view taken in that case was departed from by one of the learned Judges who was a party to that decision in the later case of *Nihali* v. *Mittar Sen* (2). There is also in favour of the appellant the ruling in *Raham Ilahi Khan* v. *Ghasita* (3), and the principle of the Full Bench ruling in *Sita Ram* v. *Madho Lal* (4) also supports the case for the appellant. That being so, the payment of the amount of the prior mortgages by the appellant was sufficient to discharge those mortgages. We allow the appeal, and, setting aside the order of the Court below, we remand the case to the Court of first instance, with directions to re-admit it under its original number in the register and proceed to try it on the merits. The appellant will have his costs of this appeal. Other costs will follow the result.

Appeal decreed and cause remanded.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1902
May 31.

CHAJMAL DAS (OBJECTOR) *v.* LAL DHARAM SINGH (OPPOSITE PARTY).*

Civil Procedure Code, section 246—*Execution of decree—Cross decrees—Set-off—Decree against which set-off is claimed not before the Court for execution.*

Section 246 of the Code of Civil Procedure clearly contemplates that where one decree is sought to be set off against another, the decree against

*First Appeal No. 224 of 1901 from an order of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 28th June 1901.

(1) (1896) I. L. R., 19 All., 180.
(2) (1898) I. L. R., 20 All., 446.
(3) (1898) I. L. R., 20 All., 375.
(4) (1901) I. L. R., 24 All., 44.

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which the set-off is asked for must be before the Court for execution. *Rewa Mahton* v. *Ram Kishen Singh* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gokul Prasad* and Munshi *Haribans Sahai*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BANERJI, J.—The facts out of which this appeal has arisen are these. One Dharam Singh obtained a decree against Brij Bhukan Lal and others on the 21st September 1895. That was a decree for sale upon a mortgage. After the sale of the mortgaged property the decree-holder obtained, on the 10th February, 1900, a decree under section 90 of the Transfer of Property Act. In execution of this decree he caused a decree held by Brij Bhukan Lal and others against one Chajmal Das, dated the 9th September, 1892, to be attached. It is common ground that the decree last mentioned was passed by the Court of the Subordinate Judge of Mainpuri, and was not in course of execution at the time when it was attached. It is also admitted that Dharam Singh by virtue of the attachment did not apply for the execution of the decree. It appears that Chajmal Das holds a decree, dated the 5th October, 1882, against Brij Bhukan Lal and others. He came forward with an application to the Court which had attached Brij Bhukan's decree against Chajmal Das, and prayed that the amount of his decree, dated the 5th October, 1882, should be set off under section 246 of the Code of Civil Procedure against the amount of the decree held against him by Brij Bhukan Lal and others. The lower Court has refused this application, and from the order of the lower Court this appeal has been preferred.

In our opinion the application of Chajmal Das was premature. Section 246 of the Code of Civil Procedure clearly contemplates that when a decree is sought to be set-off against another, the decree against which the set-off is asked for must be before the Court for execution. This is evident from the position of section 246 in the Code. Chap. XIX, in which the

(1) (1886) L. R., 13 I. A., 106, p. 110.

section appears, relates to "the execution of decrees," and the sub-head E, under which section 246 occurs, provides "the mode of execution of decrees." It was observed by their Lordships of the Privy Council in *Rewa Mahton* v. *Ram Kishen Singh* (1) that the Court before which cross-decrees may be produced "is the Court to which the application is made for execution, and which is dealing with the case as to whether execution shall be issued or not." These observations of their Lordships leave no room for doubt that the decree against which a set-off is claimed must be before the Court for execution. As the decree of Brij Bhukan Lal against Chajmal Das was not before the Court for execution, Chajmal Das was not entitled to claim a set-off under section 246, and his application was premature. On this ground alone his application ought to have been dismissed. The result is that we affirm the order of the Court below and dismiss this appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1902
June 10.

AMOLAK RAM AND ANOTHER (PLAINTIFFS) *v.* CHANDAN SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Mortgage of an undivided share—Effect on such mortgage of a subsequent partition.

A mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, but the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. *Byjnath Lall* v. *Ramoodeen Chowdry* (2) and *Hem Chunder Ghose* v. *Thako Moni Debi* (3) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *C. C. Dillon*, Dr. *Satish Chandra Banerji* and Munshi *Jang Bahadur Lal*, for the appellants.

Messrs. *D. N. Banerji* and *G. W. Dillon*, and Munshi *Govind Prasad*, for the respondents.

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* Second Appeal No. 426 of 1900 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 3rd of February, 1900, confirming a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 20th of April, 1899.

(1) (1886) L. R., 13 I. A., 106, p. 110. (2) (1874) L. R., 1 I. A., 106.
(3) (1893) I. L. R., 20 Calc., 533.

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STANLEY, C. J., and BANERJI, J.—This appeal arises out of a suit for contribution brought by the plaintiffs appellants under the following circumstances:—On the 1st of June, 1878, one Naubat Singh executed a mortgage in favour of Mukand Singh and Munna Singh, the predecessors in title of the defendants first party. The mortgage comprised a 5 biswa share in the village Muzaffra, and shares in three other villages. Naubat Singh, Sher Singh and the mortgagees Mukand Singh and Munna Singh were joint owners of certain property. On the 6th of June, 1878, that is, five days after the mortgage, a partition took place between these persons, under which the whole of the village Muzaffra, including, of course, the five biswas mortgaged under the mortgage of the 1st of June, 1878, was allotted to the share of Mukand Singh and Munna Singh. On the 28th of June, 1880, Mukand Singh and the heirs of Munna Singh, who had in the meantime died, obtained a decree upon their mortgage against Naubat Singh. That was a decree for the sale of all the property comprised in the mortgage, including the 5 biswa share in Muzaffra. Before that decree was obtained, Naubat Singh and Sher Singh had executed a mortgage in favour of the present plaintiffs on the 21st of May, 1880, mortgaging to them all the property which had fallen into their share under the partition referred to above, and another village Atrauli. That mortgage included shares in two of the villages which had been mortgaged to Mukand Singh and Munna Singh in 1878. The plaintiffs were not made parties to the suit brought by Mukand Singh and the heirs of Munna Singh upon their mortgage. The plaintiffs brought a suit upon their own mortgage of 1880 without joining in that suit the prior mortgagees, and obtained a decree on the 20th of September, 1881. In execution of that decree they purchased, on the 20th November, 1885, a 5 biswa share in Chalessar and a 10 biswa share in Khera Buzurg, which included the shares in those villages comprised in the mortgage of 1878. On the 30th of November, 1884, the decree obtained by Mukand Singh and the heirs of Munna Singh was assigned by them to Lachmi Narain, defendant No. 6. The deed of assignment contained a stipulation to the effect that Lachmi Narain was not to proceed against the 5 biswa share of Muzaffra

Execution of the decree was taken out by Lachmi Narain, and he applied for the sale of the shares in the villages Khera Buzurg and Chalessar, which the plaintiffs had purchased in execution of their own decree. The plaintiffs preferred an objection, which prevailed in the Court executing the decree. Thereupon Lachmi Narain brought a suit, and obtained a decree on the 5th of November, 1886, declaring that the villages purchased by the plaintiffs were liable to sale in execution of the decree of 1880. In order to save the property from sale in pursuance of this decree, the plaintiffs discharged the decree of 1880, and brought the present suit for contribution against the principal defendants, the legal representatives of Mukand Singh and Munna Singh, upon the ground that the 5 biswa share of Muzaffra mortgaged to Mukand Singh and Munna Singh in 1878, and allotted to their share by partition, was liable to contribute rateably towards the mortgage-debt. The suit was resisted on the ground that at the time of the partition it was agreed between the mortgagor and the mortgagees that the 5 biswa share in the village Muzaffra should be released from liability, and should not be deemed to be a part of the mortgaged property. This contention found favour with both the Courts below, and those Courts, holding that it was intended that the mortgage should not be enforced against the village Muzaffra, and that the village in question was consequently not liable under the mortgage of 1878, have dismissed the suit.

The plaintiffs have preferred this appeal, and two contentions have been raised on their behalf. The first is that, notwithstanding the partition, the share in Muzaffra was still liable under the mortgage; the second contention is, that the defendants are estopped from asserting that the village in question is no longer liable under the mortgage of 1878 and the decree obtained on foot of it.

As regards the first contention, it may be observed that the lower appellate Court has found that at the time of partition both the parties to the mortgage intended that the mortgage should not be enforced against Muzaffra. That must be taken to be a finding of fact, and cannot be challenged in second appeal. In the next place, it has been held by their Lordships of the

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Privy Council in *Byjnath Lall* v. *Ramoodeen Chowdry* (1) that the mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of of fraud, be enforced by the mortgagee against the share originally mortgaged, and that the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. The principle of this ruling was followed by the Calcutta High Court in *Hem Chunder Ghose* v. *Thako Moni Debi* (2). The learned Judges observed in that case :—"The mortgage was subject to the right of those sharers to enforce a partition, and, as their Lordships held in the cases referred to, thereby to convert what was an undivided share of the whole into a defined portion held in severalty. In the absence, therefore, of any fraud in effecting the partition, plaintiff has no right to proceed against that portion of the undivided mortgaged property which, on partition, was allotted to the defendants, but he can proceeed against that portion of the undivided property which was allotted to the mortgagors defendants in substitution of their undivided share in the portion mortgaged." Consequently after the partition which took place in 1878, as to which there is no suggestion at all of fraud or collusion, the mortgage of 1878 could not be enforced against the 5 biswa share in the village Muzaffra which passed out of the share of the mortgagor under the partition. The plaintiffs, therefore, cannot claim that the said share was still liable to contribute towards the payment of the mortgage debt.

As to the plea of estoppel, it is based upon the fact that Mukand Singh and the heirs of Munna Singh, in suing upon their mortgage, asked for a decree for the sale, among other property, of the share in Muzaffra, and obtained a decree for the sale of that share; and it is urged that after having obtained such a decree, it is no longer open to their representatives to contend that the share in their possession is not liable under the decree. This might probably have been a valid contention had it been alleged that the plaintiffs had been induced by the fact of the existence of the said decree to purchase the shares comprised in that decree which they did purchase and to discharge

(1) (1874) L. R., 1 I. A., 106. (2) (1893) I. L. R., 20 Calc., 533.

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the decree. Before their purchase the decree had been assigned to Lachmi Narain, who applied for its execution, and in the deed of assignment it was distinctly provided that the share in Muzaffra should not be proceeded against, but should be deemed to be released from liability. It is not asserted on behalf of the plaintiffs that they were ignorant of the provisions of this sale-deed. On the contrary, the allegations contained in the plaint show that they were fully cognizant of what that sale-deed provided. They have set out among the terms of the sale-deed the clause which was to the effect that the decretal amount would not be recoverable from the 5 biswa share of Muzaffra. So far, therefore, from the plaintiffs having been misled by the decree of 1880, they were fully aware when they satisfied that decree that the share of Muzaffra was no longer liable under it. That being so, they cannot plead estoppel against the defendants, and claim contribution from them upon the ground of the liability of that share to contribute rateably towards the mortgage debt.

In our opinion this appeal must fail. We dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Blair and Mr. Justice Aikman.

1902
June 10.

KALLU AND ANOTHER (DEFENDANTS) *v.* DIWAN (PLAINTIFF).*

Land-holder and tenant—Mortgage of holding by land-holder to tenant—Mortgagee's rights as tenant not merged in his rights as mortgagee.

The fact of a tenant's taking a mortgage of land comprised in his holding from his landlord does not of itself extinguish the tenancy by merging the rights of the tenant in those of the mortgagee. The effect of such a mortgage on the tenant rights would be merely that they would be in abeyance. When the landlord redeemed the mortgage, the parties would revert to their former position, and the landlord would not be entitled to get possession of the land except by ejecting the tenant in due course of law.

IN the suit out of which this appeal arose the plaintiff claimed a decree for redemption of a usufructuary mortgage of 17 bighas 17 biswas situated in mauza Kaserwa Kalan, pargana Shamli, executed on the 1st of May 1890 in favour of the defendants and their deceased brother Tarif. The plaintiff alleged that on the date mentioned he (the plaintiff) put the mortgagees in possession, and "accordingly they have been in

*Appeal No. 59 of 1901 under section 10 of the Letters Patent.

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possession as mortgagees up to this time." The defendants admitted that the plaintiff had mortgaged some land to them, but asserted that of that land the plaintiff had never in fact given them possession. They stated further that they were in possession of 17 bighas 17 biswas of the plaintiff's land, but that they were in possession as tenants and not as mortgagees, and that that land was not mortgaged. The defendants averred that the plaintiff had brought the present suit in collusion with the patwari in order to get possession of their tenancy and prevent any occupancy rights accruing in their favour.

The Court of first instance (Munsif of Kairana) found that the mortgaged land was identical with that which the defendants asserted to be their tenancy, and therefore gave the plaintiff a decree for redemption, though not for possession. The plaintiff appealed, and the lower appellate Court (Additional Subordinate Judge of Saharanpur) modified the decree of the first Court by decreeing possession in favour of the plaintiff. The lower appellate Court apparently held that the question whether the defendants were or were not tenants of the mortgaged property was not one which arose on the pleadings, but if they were, they could be no more than non-occupancy tenants, and by accepting the mortgage they had by their own act changed the nature of their possession from that of tenants to that of mortgagees. The defendants appealed to the High Court, where the appeal came before Banerji, J., sitting singly, by whom the following judgment was delivered:—

"In my opinion the lower appellate Court arrived at a right conclusion. The suit was one for the redemption of a mortgage alleged to have been made in favour of the appellants in 1890. The quantity of land mortgaged is 17 bighas 17 biswas, and the amount of the mortgage money was Rs. 360. It is admitted that a mortgage of that quantity of land was made in favour of the appellants for that amount. Their defence to the suit was that the land mortgaged to them was not the land of which the plaintiff claimed possession. They asserted that they were mortgagees of a different piece of land, and that the land of which possession was claimed was their occupancy holding. The Court of first instance held that the land which was claimed by the

plaintiff in this suit was the land which he had mortgaged to the defendants under the mortgage of 1890. This finding has been accepted by the defendants and has become final. The Court of first instance, however, was of opinion that the defendants were non-occupancy tenants of the said land before the mortgage was made, and that Court, holding that they are still tenants of the land and cannot be ousted from it, made a decree for redemption, but dismissed the claim for possession. The plaintiff appealed. The lower appellate Court set aside that portion of the decree which refused to award possession to the plaintiff.

"The lower appellate Court was right in saying that the Court of first instance had granted to the defendants a relief which they had never asked for, and had arrived at a finding contrary to the pleadings of the parties. The defendants denied that they were mortgagees of the land in suit. They never asserted that they were both mortgagees and tenants of that land; so that the Court of first instance, in holding that they continued to be tenants in spite of the mortgage, came to a finding which was not in accordance with the defendants' plea. I take the lower appellate Court to hold that when the defendants took a mortgage of the land of which they had been non-occupancy tenants, they gave up the tenancy and became mortgagees, and thus ceased to be tenants. There can be no doubt on the findings that the defendants had at the date of the mortgage no right of occupancy in respect of the mortgaged land. It is also noticeable that the mortgage deed does not purport to mortgage the zamindari rights of the mortgagor maintaining the tenancy rights of the mortgagees. It is not the defendants' case that they were both mortgagees and tenants. From these circumstances it may be rightly inferred, and that I take to be the inference at which the lower appellate Court has arrived, that the defendants ceased to be the tenants of the plaintiff, and took a mortgage of the land of which they were tenants. That being so, no question of the acquisition of a right of occupancy or of the existence of a tenancy arises, and the mortgagor is entitled to possession of the land which he mortgaged to the defendants under the usufructuary mortgage in question. This case is different from that of a mortgage, which included land in

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which the mortgagee had a right of occupancy before the mortgage. I dismiss the appeal with costs."

On appeal under section 10 of the Letters Patent by the defendants mortgagees from this judgment—

Maulvi *Muhammad Ishaq*, for the appellants.

Mr. *Abdul Raoof*, for the respondent.

BLAIR, *J.*—The plaintiff sued for the redemption of a usufructuary mortgage, dated the 1st of May, 1890. The mortgagees pleaded that the mortgage in question did not apply to the land which was sought to be redeemed, and they alleged that in the land sought to be redeemed they had a tenancy. The Court of the Munsif held that the mortgage did apply to the plot in which the tenancy of the mortgagees lay, and gave the plaintiff a decree for redemption; but, having regard to the fact of the existence of the tenancy, declined to give him a decree for possession. The Court of first appeal agreed with the finding that the mortgage applied to the plot of which the mortgagees declared themselves to be, and in the absence of evidence by the plaintiff must be taken to be, tenants. The first appellate Court, however, held that the defendants by their act of accepting the mortgage of the same land had changed the nature of their possession, and that the plaintiff, when he claimed redemption, was entitled to get actual possession. On appeal to this Court, our brother Banerji held, supporting the decision of the lower appellate Court, that it may be rightly inferred, and I take it to be the inference at which the lower appellate Court had arrived, that the defendants ceased to be the tenants of the plaintiff by taking a mortgage of the land of which they were tenants up to the date of the mortgage. In my opinion the lower appellate Court, and also the learned Judge of this Court, held that as an inference of law arising from the fact of the defendants accepting a mortgage from their landlord, and they held not upon any evidence external to that transaction. As a proposition of law, we find ourselves unable to accept the ruling of the Judge of this Court and of the lower appellate Court. In our opinion the effect of the mortgage was not to destroy the tenancy, but only to suspend the obligation of the tenant to pay rent to the landlord while the mortgage

subsisted. We entirely agree with the ruling of our brother Burkitt in second appeal No. 122 of 1898, upon which judgment was delivered on the 20th December, 1898,* a case which, we may remark, would properly find place in the Indian Law Reports, that no such extinction of tenancy or merger in effect took place on the grant to an occupancy tenant of a usufructuary mortgage by his landlord. In our opinion the ruling in that case is absolutely sound law, and governs cases of tenancy of a less durable character than an occupancy right. I would therefore decree this appeal, set aside the judgment of the Judge of this Court and also of the lower appellate Court, and restore the decree of the Munsif, with this observation that the possession to which the plaintiff is entitled is a possession subject to the subsisting tenancy. He will have the right to receive the rent, but will not enter into physical possession until such time as the tenancy has been determined according to law.

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*The judgment in this case was as follows:—

BURKITT, J.—In my opinion the decision of the Additional Judge in this case cannot be supported. I entirely dissent from the novel and extraordinary doctrine laid down by the Additional Judge that, if an occupancy tenant lends money to his landlord and takes from his landlord a mortgage of an area of land, which includes his own occupancy holding, he thereupon ceases to be an occupancy tenant under some novel doctrine of merger, apparently invented for this case. If this doctrine were affirmed, the result would be that the occupancy tenant referred to would be in a much worse position after his possession as mortgagee had ceased than before. For according to the Additional Judge he would have ceased to be an occupancy tenant. I cannot assent to this doctrine. I see no reason why in such a case the occupancy tenure should be forfeited, and it is the first time I have heard such a doctrine mooted.

As to the fact that the defendant was an occupancy tenant, there can be no doubt. It is admitted that a suit for his ejectment was dismissed by the Revenue Court on the ground that he was an occupancy tenant. The Additional Judge says he was not. That, however, is not a matter within his cognisance to decide. It is for the rent Court—and rent Court alone—to decide the nature of a tenancy. The rent Court in this case has held that the defendant is an occupancy tenant.

The Courts below have given the plaintiff a decree for redemption on payment of one hundred and thirty rupees. As far as it goes, that decree is right. But there must be this added to it, *viz.*, that as the defendant is an occupancy tenant, the plaintiff on redemption will not be entitled to physical possession by ouster of the defendant.

I allow this appeal as stated above with costs.

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AIKMAN, J.—I am of the same opinion, but as we are differing from our learned colleague, I think it necessary to add a few words. The suit was, as has already been stated, one for redemption of a mortgage and for actual possession of the mortgaged land. The mortgage deed contains no materials by which the land mortgaged can be ear-marked. The defendants pleaded that the land which the plaintiff sought to get possession of had been for a long period anterior to the date of the mortgage held by them as agricultural tenants. It is true that they denied that the mortgage related to the land claimed by the plaintiff, and in this respect the finding of the Court of first instance was against them, and to that finding they submitted. But with reference to the defendant's plea that they had prior to the mortgage been tenants of the land in suit, the learned Munsif found in favour of the defendants, and that finding the plaintiff did not in his appeal venture to challenge. The Munsif came to the conclusion upon the evidence that the defendants had been in possession of the land in suit for ten years prior to the mortgage. He went on to discuss the question whether the defendants' occupation of the land during the term of the mortgage would go to make up the term necessary to give them a right of occupancy in the land, and he came to the conclusion that the defendants had acquired a right of occupancy. In my judgment the Munsif's conclusion was wrong, and the status of the defendants was not a matter which he as a Civil Court was empowered to determine. The finding as to the status of the defendants is, however, quite irrelevant to this case. The lower appellate Court and our learned colleague came to the conclusion that the effect of the mortgage was to put an end finally to the defendants' tenancy. In my opinion that is a conclusion which is not warranted by law. It is not pretended that the inference as to the effect of the mortgage is based upon any evidence. I entirely agree with my brother Blair in what he has said upon this question. The effect of the mortgage was to suspend for the time being the relationship of landholder and tenant between the parties. When the mortgage is redeemed, the parties are relegated to the position which they occupied immediately before the mortgage was executed. Our learned colleague, whose judgment is under

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appeal, distinguishes the case decided by Mr. Justice Burkitt on the 20th of December, 1898, on the ground that the tenancy there was an occupancy tenancy. I cannot draw any such distinction. If the defendants were not occupancy tenants when they entered into the mortgage they were at all events agricultural tenants, who had certain rights including the right to retain possession of their holding until ousted in due course of law. For the reasons set forth above, I concur in the order proposed.

By THE COURT.—The order of the Court is that the appeal is allowed with costs; the decision of this Court and of the lower appellate Court set aside with costs, and that of the Court of first instance is restored. We extend the time for payment of the mortgage money up to the 10th of September next.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

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June 10.

RAN BAHADUR RAI AND ANOTHER (PLAINTIFFS). *v.* PARMESHAR BHARTHI (DEFENDANT).*

Pre-emption—Mortgage by conditional sale—Accrual of right of pre-emption when sale becomes absolute — Wajib-ul-arz — Partition of mahal.

The wajib-ul-arz, framed in 1883, of an undivided mahal consisting of several villages contained the following provision as to pre-emption:—"Should a sharer of any patti sell his share, he will sell it first to subordinate sharers; if they refuse to take it, then to sharers in the patti; and if they also do not take it, then to proprietors of the mahal; and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger."

While this wajib-ul-arz was in force, namely, in 1890, certain property, to which its provisions applied, was mortgaged by a deed of conditional sale. In 1894, after partition of the mahal, a new wajib-ul-arz was framed for the mahal in which the mortgaged property was situated, which also contained a similar record of the custom of pre-emption in the following terms:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal."

Held that the record as to the right of pre-emption being in both cases the record of a custom, and the provisions of the latter wajib-ul-arz being capable of application to the circumstances of the case, a right of pre-emption

* Second Appeal No. 339 of 1900 from a decree of R. Greeven, Esq., District Judge of Ghazipur, dated the 17th January 1900, reversing a decree of Maulvi Syed Zain-ul-Abdin, Subordinate Judge of Ghazipur, dated the 22nd February 1897.

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accrued to the share-holders in one of the other mahals into which the original mahal had been divided, upon the mortgage by conditional sale becoming an absolute sale in favour of a stranger.

Alu Prasad v. *Sukhan* (1) followed. *Bechan Rai* v. *Nand Kishore Rai* (2), and *Gaya Bharthi* v. *Lakhnath Rai* (3) distinguished.

THE suit out of which this appeal arose was a suit for pre-emption brought under the following circumstances:—On the 24th of July 1890 several co-sharers in a mahal called Kheri Rai executed a mortgage by conditional sale in favour of one Parmeshar Bharthi. At that time the subsisting wajib-ul-arz of the mahal was one framed at the settlement of 1883-1884, which contained the following provision as to the custom of pre-emption:—"Should a sharer of any patti sell his share, he will sell it first to subordinate sharers: if they refuse to take it, then to the sharers in the patti: and if they also do not take it, then to the proprietors of the mahal; and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger." In 1894 there was a perfect partition into 13 mahals, for each of which a new wajib-ul-arz was prepared containing the following observations on the subject of pre-emption:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal." On the 12th of February 1895 the mortgagee sued for foreclosure, and on the 5th of March following obtained a decree in the terms of section 86 of the Transfer of Property Act, 1882. This decree became absolute on the 13th of February 1896, and possession was delivered through the Court on the 10th of May. On the 4th of July 1896 the present suit was filed. The plaintiffs, who were co-sharers in the new mahal, Ran Bahadur, alleged that they were entitled on a construction of both the wajib-ul-arzes above referred to, to pre-empt the property mortgaged in 1890 to Parmeshar Bharthi, which was situated in mahal Nihal Rai, the conditional sale having become absolute on the 13th of February 1896. The Court of first instance (Subordinate Judge of Ghazipur) gave the plaintiffs a decree; but on appeal by the defendant the District Judge

(1) (1881) I. L. R., 3 All., 610. (2) (1892) I. L. R., 14 All., 341.
(3) (1897) I. L. R., 20 All., 103.

reversed that decree, holding, on an interpretation of the ruling in *Bechan Rai* v. *Nand Kishore Rai* (1), that the plaintiffs had no right of pre-emption. The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid* and Munshi *Gobind Prasad*, for the appellants.

Munshi *Haribans Sahai* and Babu *Sital Prasad Ghosh*, for the respondent.

STANLEY, C. J., and BANERJI, J.—The suit out of which this appeal has arisen was a suit instituted by the plaintiffs to pre-empt certain villages. It appears that the defendant second party mortgaged the villages in dispute to the defendant first party on the 24th of July, 1890, by a deed of conditional sale. On the 12th of February, 1895, the defendant first party instituted a suit for foreclosure against the second party of defendants, and a primary decree was passed on the 25th of March, 1895. The order absolute for foreclosure was made on the 13th of February, 1896, and possession was obtained on the 10th of May, 1896. On the 4th of July, 1896, following, the present suit for pre-emption was instituted by the plaintiffs, who are co-sharers in the villages. They based their claim upon the terms of the wajib-ul-arz, to which we shall presently refer. The Court of first instance decreed the plaintiffs' claim; and thereupon an appeal was taken to the lower appellate Court, with the result that the lower appellate Court reversed the decree of the Court of first instance and dismissed the plaintiffs' suit. The grounds upon which the lower appellate Court dismissed the suit were, that the wajib-ul-arz of 1883 and that of 1894 expressly limited the right of pre-emption to the case of a sale, and did not contemplate its accrual in the case of a mortgage; that it was manifest, therefore, that "no right could possibly have accrued until the decree absolute had taken effect on the 13th of February, 1896. Even then, however, no right of pre-emption could arise, because the change of transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale." For this proposition the learned Judge quotes as his authority the case of

(1) (1892) I. L. R., 14 All., 341.

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Bechan Rai v. *Nand Kishore Rai* (1). The wajib-ul-arz prepared at the settlement of 1883 contains the following provisions as to the right of pre-emption :—"Should a sharer of any *patti* sell his share, he will sell it first to subordinate sharers; if they refuse to take it, then to the sharers in the *patti;* and if they also do not take it, then to the proprietors of the *mahal;* and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger." In the wajib-ul-arz as framed on partition in 1894 substantially the same provision is contained in clause 13 as to the right of pre-emption. The words are as follows :—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal by the sharer in the mahal, to a sharer in the old mahal." It is to be observed that these provisions as to pre-emption are founded, as appears by the wajib-ul-arz, on custom, and not on contract, and it is perfectly clear that the custom which prevailed in 1883 was not superseded when the partition was effected in 1894, but that that custom was carried on, and recognized by the sharers of the property in 1894. If there had been any real conflict in the nature of the custom as stated in the wajib-ul-arzes of these two years, different considerations might arise; or if it had been the case that the wajib-ul-arz which was framed on the partition in 1894 had been the outcome of a contract of the parties then entered into, also different considerations would arise. But here the provisions as to pre-emption are provisions which have arisen from custom, and which have been carried on from a time anterior to 1883 down to the present time. Now the District Judge appears to us to have entirely misconceived and misinterpreted the case on which he relies, namely, the case of *Bechan Rai* v. *Nand Kishore Rai.* In that case a share-holder in a village executed two deeds of conditional sale of his share. Subsequently to the execution of the deeds and to the making of the contracts embodied in them, a wajib-ul-arz was prepared, agreed to and sanctioned in the village. After the making of the wajib-ul-arz a suit was brought by the mortgagee on foot of his mortgages, and the conditional sale made to him by the mortgages became an absolute sale.

(1) (1892) I. L. R., 14 All., 341; S. C., Weekly Notes, 1892, p. 18.

Thereupon a pre-emption suit was brought by some of the co-sharers in the village, claiming by right of the wajib-ul-arz to pre-empt the sale. The plaintiff did not rely upon any custom of pre-emption existing in the village at the time of the execution of the deeds of conditional sale. He simply relied upon the agreement contained in the wajib-ul-arz, which was subsequent in date to the mortgages, and was not based on custom. The learned Chief Justice, Sir John Edge, in his judgment, says :—"It appears to me that no subsequent village contract, to which the parties to the conditional sale deeds were not agreeing parties, could alter the rights of the conditional vendee under his deeds. Those rights came into existence on the making of the deeds of conditional sale. The change of the transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale." The learned District Judge misconstruing this judgment says, in the course of his judgment, that "no right of pre-emption could arise because the change of transaction from one of mortgage to one of absolute sale merely followed as the legal result of events contemplated by the contract of conditional sale; and whether the wajib-ul-arz evidences a custom or contract, it is unnecessary to decide, for in either case a mortgage is not contemplated as a transaction giving a right of pre-emption." The Court in the case to which we have referred laid down no such proposition. The District Judge overlooks the fact, too, that in that case the claim was based upon contract, and not upon custom, as in the present case. All that was decided by the Court was, that a wajib-ul-arz, which was the creature of a contract entered into after the date of a mortgage, can in no way be allowed to prejudice the rights of the mortgagee, he being no party to the wajib-ul-arz, and that consequently, having had a right to convert his conditional sale into an absolute sale, unfettered by any right of pre-emption before the wajib-ul-arz was agreed to, he was not precluded from exercising that right absolutely, regardless altogether of the provisions of the wajib-ul-arz subsequently entered into. Then it is said by the District Judge that the wajib-ul-arz in this case did not contemplate the accrual of the right of pre-emption in the case of a mortgage.

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That is so; but when a conditional sale has been made absolute, it becomes an absolute sale of property, and upon so becoming absolute the right of pre-emption at once springs up under the provisions of the wajib-ul-arz. This was so decided in the Full Bench case in this Court of *Alu Prasad* v. *Sukhan* (1). In that case a party mortgaged by way of conditional sale a share of a village to a stranger. The mortgage was foreclosed. Whereupon the mortgagee sued the mortgagor for possession, and obtained a decree, in execution of which he obtained possession of the share in 1878. On the 1st of September, 1879, a co-sharer sued both the mortgagor and mortgagee to enforce his right of pre-emption in respect of the share, and founded his suit upon the following clause in the administration paper of the village, namely:—"When a share-holder desires to transfer his share, a near relative shall have the first right; next, the share-holders of other *pattis*; if all these refuse to take, the vendor shall have power to sell and mortgage, etc., to whomsoever he likes." The facts of this case seem to be on all fours with the case before us. It was there held by the members of the Court (Mr. Justice Pearson alone dissenting), that, having regard to the terms of the wajib-ul-arz, the co-sharer in the village was entitled to pre-empt when the mortgage by conditional sale was foreclosed. This case seems to us to govern the present case. We have been referred, however, to a case as deciding the contrary, and that is the case of *Gaya Bharthi* v. *Lakhnath Rai* (2). In that case, it is sufficient to say that the judgment of the Court was based upon the language of the wajib-ul-arz. It was held that the wajib-ul-arz only contemplated a right of pre-emption in two cases, namely, when a co-sharer made a mortgage of his share; and, secondly, when the term of the mortgage was about to expire, and notice of foreclosure had been issued. It did not provide for pre-emption when the right to redeem had already been foreclosed, and it was on these special terms of the wajib-ul-arz that the Court held that, once the equity of redemption had been foreclosed, the co-sharer was late in seeking his remedy by pre-emption. For these reasons we are of opinion that the decision of the learned District Judge was wrong, and

(1) (1881) I. L. R., 3 All., 610. (2) (1897) I. L. R., 20 All., 103.

that the judgment of the Court of first instance was correct. We therefore allow the appeal, set aside the decree of the District Judge, and restore that of the Court of first instance. The appellants will have their costs of this appeal, and also their costs in the lower appellate Court.

Appeal decreed.

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Before Mr. Justice Blair.

1902 *June* 14.

BEHARI LAL AND OTHERS (PLAINTIFFS) *v.* GHISA LAL AND OTHERS (DEFENDANTS).*

Injunction—Maxim—Cujus est solum ejus est usque ad cœlum—Question whether common law rights of owner can be limited by religious prejudices of neighbours.

Certain plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a pipal tree overhanging their property. The pipal tree grew in the inclosure of a temple, and the resistance was based on the ground that the tree was an object of veneration to Hindus, and that the lopping of its branches would be offensive to the religious feelings of the Hindu community.

Held that the plaintiffs were entitled to the injunction prayed for, and that the fact that the plaintiffs' action might cause annoyance to a large number of Hindus, was not a sufficient ground for cutting down the well recognized common law rights of an owner of property.

THE facts of this case sufficiently appear from the order of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the appellants.

Pandit *Madan Mohan Malaviya*, for the respondents.

BLAIR, J.—This appeal impugns the propriety of a decision of the Subordinate Judge of Moradabad dismissing the plaintiffs' suit under the following circumstances. The plaintiffs are the owners of a house adjacent to the site of a Hindu temple. Near their house stands in the temple inclosure a pipal tree, the branches of which extend over their house, and which has, of course, been growing there for many years. The plaintiffs, alleging that the branches of the tree afforded facilities for a thief to obtain entrance into their house, and endangered life and property, desired to cut those branches. They were prevented

* Second Appeal No. 374 of 1901 from a decree of Rai Mata Prasad, Subordinate Judge of Moradabad, dated the 31st January 1901, confirming a decree of Maulvi Muhammad Abdul Latif, Munsif of Moradabad, dated the 30th of November 1900.

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from so doing by the defendants. The plaintiffs ask that an injunction may be issued against the defendants, enjoining them not to offer obstruction to the cutting of those branches which spread over the plaintiffs' house. Both the Munsif and the Subordinate Judge have found that the pipal tree is an object of veneration to pious Hindus, and has been growing there for over 20 years. Both of them have dismissed the plaintiffs' suit. The question is a serious one in this country, because, on the one hand, it is highly undesirable to insult or irritate the religious susceptibilities of the people; and on the other, one has to look for the existence of some principle of law by which the general feeling of one part of the population can be allowed to override the ordinary rights of property vested in another person. Mr. *Tej Bahadur*, for the appellants, contends that there is no such curtailment of individual right of property known to the law, and Mr. *Malaviya*, for the respondents, is unable, out of the long array of Indian cases, to produce a single authority in support of the judgments of the Courts below. It is not for me to find facts, but to accept them implicitly as found by the Courts below. The lopping of inconvenient boughs of such a tree as this may possibly be regarded as a sort of sacrilege by certain of the Hindu population. But it appears that the tree has been lopped before. And it is also found by the Subordinate Judge that the branches of this tree have been hanging over the old building for a considerable time. But that fact cannot, in my opinion, override the right of the appellants to occupy their house in comfort and safety. Mr. *Malaviya* does not attempt to found any argument upon the fact that the tree has been standing there for over 20 years, and indeed no such easement could be claimed.

The proposition put before me is, that if the general body of a muhalla entertain a feeling of reverence towards any tree, no individual owning a house in that muhalla can seek to lop off any of its branches which may overhang his property, even though they may prejudicially affect it. That is a proposition unsupported by authority and inconsistent with common sense. I set aside the judgments and decrees of the Courts below and decree this appeal with costs.

Appeal decreed.

1902
June 14.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SHEO KUMAR (DEFENDANT) *v.* NARAIN DAS (PLAINTIFF).*

Act No. I of 1877 (Specific Relief Act), section 9—Civil Procedure Code, section 43—Summary suit for possession—Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits—Burden of proof.

One Lachmi Narain died possessed of certain immovable property. He left him surviving a widow, Mukhta Kunwar. Narain Das obtained possession of some portion of the said immovable property, as he alleged, under a lease from Mukhta Kunwar, and held possession, at any rate, for some months, down to the 27th of November, 1897. After the death of Mukhta Kunwar, one Sheo Kumar, who claimed to be the adopted son of Mukhta Kunwar, by some means other than legal process, dispossessed Narain Das. Narain Das thereupon instituted a suit under section 9 of the Specific Relief Act, and, having obtained a decree in that suit, was restored to possession. He then instituted a suit against Sheo Kumar to recover mesne profits for the time during which he was out of possession. As to this suit it was *held* (1) that the suit was not liable to be defeated by reason of section 43 of the Code of Civil Procedure; and (2) that as to the other issues arising in the suit, the first was, whether the defendant was the true owner of the property, the burden of proving which was on him; and, secondly, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satya Chandra Mukerji*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C. J., and BANERJI, J.—This appeal arises out of an order of the District Judge of Cawnpore, remanding the case to the Subordinate Judge, under the provisions of section 562 of the Code of Civil Procedure, for the determination of the suit on the merits. The facts are shortly as follows:—One Lachmi Narain was the owner of the property which is now in dispute. He died leaving a widow Mukhta Kunwar, and the plaintiff respondent Narain Das claims to hold the property in dispute under a lease which was granted by Mukhta Kunwar in her lifetime. His name was recorded as lessee on the 17th of April, 1897, and he remained in possession until the 27th November, 1897. What the nature and the terms of the letting made by

* First Appeal No. 9 of 1902 from an order of H. P. Dupernex, Esq., District Judge of Cawnpore, dated the 18th of November 1901.

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SHEO KUMAR v. NARAIN DAS.

Mukhta Kunwar to Narain Das are have not been determined by either the Court of first instance or the lower appellate Court, and we are in ignorance as to these matters. Mukhta Kunwar having died on the 16th of July 1897, the present defendant, Sheo Kumar, claiming to be the adopted son of Lachmi Narain, by some means other than by legal process, dispossessed the plaintiff of the property in question. It is obvious that if the plaintiff was not entitled to possession under the lease made by Mukhta Kunwar, the defendant ought to have dispossessed him by regular process of law, and not in the illegal way in which he appears to have done so. Narain Das thereupon instituted a suit for possession of the property under the provisions of section 9 of the Specific Relief Act, and he obtained a decree, and on the 5th of February, 1899, re-entered into possession. The present suit was instituted by him for recovery of mesne profits during the time he was out of possession, namely, from the 27th of November, 1897, to the 5th of February, 1899. The defence set up to the suit was, amongst others, firstly, that the suit was barred by reason of the provisions of section 43 of the Code of Civil Procedure; and secondly, that the plaintiff was a lessee under a parol lease, which was for a term of more than one year, and had therefore no title to remain in possession, the lease being invalid, having regard to the provisions of section 107 of the Transfer of Property Act.

The Court of first instance sustained both these defences and dismissed the suit, but upon appeal the lower appellate Court has held that the plaintiff, having got a decree under the Specific Relief Act, had at least a possessory title, and that the Court of first instance ought to have determined the suit on the merits, and accordingly remanded the case for trial upon the merits, suggesting the determination of two issues, namely an issue as to the amount due to the plaintiff during the period of dispossession; and, secondly, as regards the alleged adoption of the defendant Sheo Kumar and the respondent's consequent title to possession as against the appellant during the latter's dispossession.

Now, on the first defence, the lower appellate Court held that section 43 of the Code of Civil Procedure did not bar the claim

for mesne profits, and we think that in this finding the Court was perfectly correct. Section 43 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make *in respect of the cause of action*. The cause of action under the Specific Relief Act is an entirely different cause of action from the cause of action set up in the present suit. Under the Specific Relief Act the plaintiff would be entitled to recover possession in any event if he had been dispossessed otherwise than in due process of law, and therefore was entitled to a decree in the suit instituted under the Specific Relief Act, whether or not the defendants who had dispossessed him were the true owners. In a suit, however, for mesne profits other considerations would arise, because, as it appears to us, in a suit to recover mesne profits for the time during which a party has been dispossessed, if it be found that he was only a trespasser, and that the person who dispossessed him was the true owner of the property, in such a case the Court could not award mesne profits as against the true owner. Therefore we think that the defence under section 43 of the Code of Civil Procedure fails.

As regards the defence set up under the provisions of section 107 of the Transfer of Property Act, it is impossible to determine the rights of the parties without knowing what were the nature and provisions of the lease which was granted by Mukhta Kunwar. Nor is it possible to determine whether or not the plaintiff is entitled to mesne profits unless it has first been ascertained whether or not the defendant is the true owner of the property. If he be not the true owner, then, even though the plaintiff had only a possessory title, it appears to us that he would be entitled to recover mesne profits against the defendant who had no title whatever. If, on the other hand, it turns out that the defendant is the true owner of the property, different considerations would arise. The plaintiff has already established his possessory title. Therefore it will lie upon the defendant to establish that he is the true owner of the property, and if he establish this, then the *onus* will be thrown on the plaintiff of showing that he has an interest in the property, under the lease which was granted to him or otherwise, which would entitle him to remain in possession as against the defendant.

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The order, therefore, of the District Judge in remanding the case is correct, but he has not directed the attention of the Court of first instance to all the issues which it is necessary to determine for the purpose of fully adjudicating upon the rights of the parties as indicated above. We therefore dismiss the appeal, and confirm the order of remand of the District Judge; but in doing so and in confirming the order of remand, we should direct the Court of first instance to have regard in the determination of the suit, to the matters which we have dealt with in our judgment. The costs of this appeal will abide the event.

Appeal dismissed.

1902
June 16.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

RANJIT SINGH AND ANOTHER (PLAINTIFFS) *v.* NAUBAT AND OTHERS (DEFENDANTS).*

Act No. IX of 1872 *(Indian Contract Act), sections* 134 *and* 137—*Principal and surety—Creditor allowing remedy against principal debtor to become barred by limitation—Discharge of surety.*

"Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him" as these words are used in section 137 of the Indian Contract Act, 1872, indicate a forbearance for a more or less limited period to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation.

Hence where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by instalments, certain persons becoming sureties for the due payment of such instalments, and, the judgment-debtor having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, it was *held* that the creditor had forfeited his remedy against the sureties also. *Hazari Lal* v. *Chunni Lal* (1) and *Radha* v. *Kinlock* (2) followed. *Hajarimal* v. *Krishnarav* (3) dissented from.

The facts of this case are as follows:—

On the 30th of March 1885 Ranjit Singh and others obtained a decree against one Harnam. The decree was transferred to the Collector for execution on the 28th of May 1886, the property which the decree-holders sought to sell being ancestral.

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* Second Appeal No. 813 of 1899 from a decree of Munshi Sheo Sahai, Additional Subordinate Judge of Meerut, dated the 20th of July, 1899, reversing a decree of Babu Daya Nath, Munsif of Meerut, dated the 20th of March 1899.

(1) (1886) I. L. R., 8 All., 259. (2) (1889) I. L. R., 11 All., 310.
(3) (1881) I. L. R., 5 Bom., 647.

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RANJIT SINGH v. NAUBAT.

On the 30th of August 1886 a compromise was entered into between the parties, whereby the plaintiffs agreed to give time to Harnam for payment of the debt upon the condition that Harnam should provide certain sureties to guarantee payment. Upon the 30th of August 1886 a bond was executed by the sureties on behalf of Harnam which provided that if Harnam failed to pay the amount of the decree by annual instalments of Rs. 100, with interest, the sureties would pay the amount of the decree, and by the bond the sureties pledged their property as security for the fulfilment of the obligation. On the 6th of November 1886 the security was accepted by the Collector, and he granted time and sanctioned the compromise. Under this arrangement six annual instalments were paid, namely, the instalments extending from the 6th of November 1887 to the 6th of November 1892. Four instalments became due on the 6th of November 1896, whereupon the decree-holders took out execution against Harnam. On the 7th of February 1898, the Munsif held that the execution proceedings against Harnam were barred by lapse of time. That order was not appealed from, and, as against the decree-holders, became final. On the 23rd of August 1898 the decree-holders brought the suit out of which this appeal has arisen to recover from the sureties the unpaid balance of the decretal debt. The Court of first instance (Munsif of Meerut) gave the plaintiffs a decree. On appeal the lower appellate Court (Additional Subordinate Judge of Meerut) reversed this decree and dismissed the suit, holding in general terms that, the plaintiffs' remedy as against the principal being barred, no remedy against the sureties remained. The plaintiffs thereupon appealed to the High Court.

Pandit *Tej Bahadur Sapru*, for the appellants.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the respondents.

STANLEY, C. J., and BANERJI, J.—The suit out of which this second appeal has arisen was instituted by the plaintiffs to recover as against the defendants a sum of money alleged to be due on foot of a surety bond entered into by them on behalf of one Harnam, a judgment-debtor of the plaintiffs. The plaintiffs on the 30th of March, 1885, obtained a decree against

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Harnam. The decree was transferred to the Collector for execution on the 28th of May, 1886, the property to be sold being ancestral property. On the 30th of August, 1886, a compromise was entered into between the parties, whereby the plaintiffs agreed to give time to Harnam for payment of the debt, upon the condition that the defendants in the present suit should guarantee the payment of the debt. This they agreed to do, and they executed on the 30th of August, 1886, a bond, which provided that if Harnam failed to pay the amount of the decree by annual instalments of Rs. 100 with interest, the sureties would pay the amount of the decree, and by the bond they pledged their property as security for the fulfilment of their obligation. On the 6th of November, 1886, the security was accepted by the Collector—we do not know under what powers—and he granted time and sanctioned the compromise. Six annual instalments were paid, namely, the instalments extending from the 6th of November, 1887, to the 6th November, 1892, by the judgment-debtor Harnam. Four instalments became due on the 6th of November, 1896, whereupon the plaintiffs took out execution against Harnam. On the 7th of February, 1898, the Munsif held that the execution proceedings against Harnam were barred by lapse of time. No appeal was taken from this order; and we must take it that, as against the original debtor, the claim of the plaintiffs is statute-barred. Thereupon, on the 23rd of August, 1898, the plaintiffs instituted the present suit to recover the balance of the debt from the sureties, the present defendants.

The defence set up was that the plaintiffs, not having appealed against the order of the 7th of February, 1898, allowed the debt to become statute-barred against the principal debtor, and, in consequence, the sureties were discharged. The Court of first instance gave a decree for the amount claimed. On appeal the lower appellate Court reversed this decree and dismissed the suit, holding, in general terms, that, the plaintiffs' remedy as against the principal being barred, no remedy against the sureties remained. The Court also held that the suit was barred by the provisions of section 257A of the Code of Civil Procedure; but having regard to the view which we

entertain upon the other question, it is unnecessary to discuss the effect of section 257A.

An appeal has been taken to this court by the plaintiffs, and the case on their behalf has been ably presented to the court by Mr. *Tej Bahadur*. We are unable, however, to follow him in the argument which he has presented. He relies with confidence on the decision of the Bombay High Court in the case of *Hajarimal* v. *Krishnarav* (1). The question turns upon the true construction of several sections of the Indian Contract Act, the first and most important of which is section 134. This section provides that "the surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, *or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.*" Section 137, which has been prominently brought to our notice, provides that "*mere* forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety." It is unnecessary for us to refer to some of the other sections which perhaps do throw some light on the question. It is contended on behalf of the appellant that in this case the forbearance of the plaintiffs to proceed with due diligence with their execution proceedings against the principal debtor, the result of which was to release him from the debt, was mere forbearance on the part of the creditor within the meaning of section 137, and therefore, in the absence of any guarantee to the contrary, did not discharge the surety. In section 134 it is provided in very clear terms that the surety is discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor. It appears to us, reading together these two sections of the Act, that the meaning of "mere forbearance" in section 137 is such forbearance, the legal consequence of which is not to discharge the principal debtor, but merely forbearance to sue immediately the debt becomes due, or for a limited time thereafter, as indeed is exemplified by the illustration to the section, whereby a period of one year after the debt has become payable

(1) (1881) I. L. R., 5 Bom., 647.

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is mentioned. It does not mean forbearance for such length of time as by reason of the statute of limitation would be a bar to the claim against the principal debtor. In the case to which we have referred in the Bombay High Court, it was decided by the Chief Justice, Sir M. Westropp, and Mr. Justice Birdwood, that, although the suit in that case was barred as against the principal debtor under the Limitation Act, yet the surety being an agriculturist, was still liable, inasmuch as section 72 of the Dekhan Agriculturists' Relief Act, which extends the period of limitation in the case of suits against agriculturists, applies to all agriculturists, whether principals or sureties, in the districts affected by the Act. In the judgment of the court the meaning of the sections of the Indian Contract Act to which we have referred, relating to contracts of guarantee, were considered, and the learned Judges were of opinion that mere forbearance means a forbearance not resting upon, or in consequence of, such a promise to give time to, or not to sue the principal debtor as is the subject of section 135. They observe:—"The omission of the creditor tosue the principal debtor within three years from the date of the bond has undoubtedly [having regard to section 2 already mentioned, and to the Limitation Act of 1877] produced the legal consequence of the discharge of the principal debtor; and *primâ facie*, if we were not to look beyond section 134, we should hold the surety to be discharged. But this view is dispelled by section 137, which qualifies section 134 by enacting that 'mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.'" We are unable to agree in this view of the sections. We think that the language of the two sections read together shows that mere forbearance is used in the restricted sense which we have already mentioned, and that it does not mean, and does not apply to a case of forbearance, the legal consequence of which is the discharge of the principal debtor. This question has been decided in two cases in this High Court, the earlier of which is the case of *Hazari Lal* v. *Chunni Lal* (1). In that case the facts are very similar to the facts of

(1) (1886) I. L. R., 8 All., 259.

the present case. A decree-holder in execution proceedings agreed to accept payment of the decretal amount by the judgment debtors in annual instalments. He also agreed to accept a surety bond for the payment of the debt from certain other persons in the following terms:—"In case of default in payment of the instalments, the whole decretal money, with costs and interest at 8 annas per cent., shall be executed after one month; and for the satisfaction of the decree-holder, we the executants stand as sureties of the judgment-debtors." The judgment-debtors paid five instalments and then made default. The decree-holder omitted to apply for execution, and the decree became time-barred. He then sued the sureties to recover the amount of the decree. It was held that the legal consequence of the omission to execute the decree being the discharge of the principal debtor, the sureties would, under section 134 of the Contract Act, stand discharged likewise; that the action of the decree-holder was much more serious than "mere forbearance" in favour of his debtors in the sense of section 137; that he had done an act inconsistent with the equities of the sureties, and omitted to do an act which his duty to them (under the agreement) required, whereby their eventual remedy against the principal debtors was impaired. The learned Judges who decided that case, Oldfield and Tyrrell, JJ., in the course of their judgment, observe:—"It must be conceded that the legal consequence of the respondents' omission to execute the decree has been the discharge of his principal debtors. The decree is dead, and they are released from all responsibility under it. The sureties then would, under the rule of section 134 of the Indian Contract Act, stand discharged likewise by virtue of this omission of the creditor. But it was argued that (section 137 *ib.*) 'mere forbearance on the part of the creditor to enforce his remedy against the principal debtor does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.' This is doubtless true; but the action of the respondent, who omitted in this case to resort to the execution of his decree, and allowed it to become a dead letter by limitation, is, in our opinion, much more serious than 'mere forbearance' in favour of his debtors." In that case the case in I. L. R., 5 Bom., does not appear to have been brought to the

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notice of the learned Judges. But in the more recent case of *Radha* v. *Kinlock* (1) the authority of the case in I. L. R., 5 Bom., was discussed by Sir John Edge, Chief Justice, and Mr. Justice Tyrrell, and it was held there that "the omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under section 134 of the Contract Act, even though the non-suing within such period arose from the creditor's forbearance; that section 137 of the Contract Act does not limit the effect of section 134; its object is to explain, and prevent misconception as to the meaning of section 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise the right which is still in existence." The learned Judges say, in reference to the Bombay case, "If the view adopted at Bombay be correct, that section (*i. e.*, section 137) applied to such a case as the present. The payment by the surety after the statutory period of limitation, so far as the debt was concerned, could not transfer to the surety any rights of the creditor against the principal debtor, for all those rights were barred at the time. Again, to take section 141, it shows that the intention of the framers of the Act was that the surety should have the benefit of every security which the principal debtor had at the time the contract of surety was entered into. We fail to see what advantage it would be to the surety to have the security which the creditor possessed against the principal debtor at the date when the contract of guarantee was entered into, if the creditor's right to sue upon the security had become barred by limitation before payment by the surety." Further on they say:—"In our opinion the liability of the surety determined as soon as the liability of the principal debtor by the omission of the creditor was discharged." We entirely concur in the view of the learned Judges who decided the last two cases to which we have referred, and we think that the decision of the lower appellate Court, which is expressed in very general terms, is, for the reasons which we have mentioned, a correct decision. We therefore dismiss the appeal with costs.

Appeal dismissed.

(1) (1889) I. L. R., 11 All., 310.

APPELLATE CRIMINAL.

1902
June 18.

Before Mr. Justice Aikman.

EMPEROR *v.* C. J. SULLIVAN.*

Criminal Procedure Code, section 451 (1)—*European British subject—Right of European British subject to be tried by a jury—Such right claimable at any time before accused has entered upon his defence notwithstanding previous waiver.*

One Sullivan was sent for trial to the District Magistrate of Meerut, the offence alleged against him being one under section 354 of the Indian Penal Code, *i. e.*, a warrant-case. At the outset of the proceedings the accused was asked whether he wished to be tried by a jury, and replied in the negative. A charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were ordered to be recalled for cross-examination. After the charge was framed, but before the accused had entered upon his defence, an application for a jury was presented on behalf of the accused. The Magistrate disallowed this application.

Held, that the fact that the accused, before the trial had begun, had stated that he did not wish for a jury, did not prevent him from afterwards claiming a jury within the time allowed by section 451 (1) of the Code of Criminal Procedure, and that the Magistrate was wrong in disallowing the application.

ONE C. J. Sullivan was sent for trial to the District Magistrate of Meerut, the offence alleged against him being one under section 354 of the Indian Penal Code, *i.e.*, a warrant case. At the outset of the proceedings the Magistrate formally asked the accused whether he wished to be tried as an European British subject, and formally recorded the answer of the accused that he did not. The trial was then proceeded with and a charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were recalled for cross-examination. About this stage of the trial, before a date had been fixed for the re-appearance of the prosecution witnesses asked for by the accused, an application was presented on behalf of the accused asking that he might be tried by a jury. The Magist e rejected this application as having been made too late, and, continuing the trial, found the accused guilty and sentenced him accordingly. Against this conviction and sentence the accused first applied in revision to the High Court, but, after the finding of the Court that by reason of section 439(5) no application in revision could be entertained, the

* Criminal Appeal No. 434 of 1902.

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EMPEROR v. C. J. SULLIVAN.

present appeal was filed. The sole contention argued (though the appeal was on the merits) was that the Magistrate was wrong in refusing the appellant's application for a jury.

Mr. *C. Dillon*, for the appellant.

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown.

AIKMAN, J.—This is an appeal on behalf of one C. J. Sullivan, who has been convicted by the District Magistrate of Meerut of an offence punishable under section 354 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment. The appeal is on the merits. But a preliminary objection is also taken in the petition of appeal to the legality of the proceedings of the District Magistrate.

Without entering into the merits of the case, I am of opinion that this appeal must be disposed of on the legal objection referred to. The appellant is an European British subject. The offence with which he was charged is an warrant case within the meaning of the Code of Criminal Procedure. By the provisions of section 451, sub-section (1) of the Code, an European British subject, in a trial before a District Magistrate in a warrant case may, "before he enters on his defence under section 256, claim that the trial shall be by jury." It appears that, in the present case, at the outset of the proceedings, the accused was asked if he wished to be tried by a jury, and replied in the negative. A charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were ordered to be re-called for cross-examination. In his judgment the Magistrate observes:—"After the charge-sheet had been framed, an application for a jury was presented on his (the accused's) behalf. But it was then too late to accede to such a request." This application, it appears, was made by the accused's counsel on the 22nd of April, before the date fixed for the re-appearance of the witnesses for the prosecution. The language of section 256 shows that the application thus made was made before the accused entered on his defence. It was refused by the District Magistrate who dealt with the case himself. The sole question which I have to determine is, whether the fact that the accused, before the trial had begun,

stated that he did not wish for a jury, prevented him altering his mind afterwards, and claiming a jury within the time allowed by section 451, sub-section (1). I am clearly of opinion that there was nothing to prevent the accused, when he had heard the evidence for the prosecution, altering his mind and availing himself of the privilege allowed him by law. His refusal to claim that privilege at the outset of the proceedings can in no way estop him from afterwards asserting his right, provided he does so before he has entered on his defence. After that it would be too late. It may well be that an accused, before he has heard the evidence for the prosecution, may think the case had better be disposed of by the Magistrate himself, and that after he has heard the evidence he may see that it would be for his benefit to have the evidence submitted to a jury. I therefore hold that the Magistrate's opinion that it was too late on the 22nd of April to accede to the accused's request is erroneous. That request ought to have been granted, and after it was made, the Magistrate had no power to dispose of the case himself.

For this reason I quash the conviction and sentence, and direct that the Magistrate take up the case from the stage it had reached when the request was made, that he grant that request, and thereafter deal with the case according to law. If the accused was on bail during the trial he ought to be admitted to the same bail. If not, he will be detained as an under-trial prisoner until the conclusion of the trial or until further orders. I note that at the conclusion of his judgment the learned District Magistrate says that he would have committed the case to the Court of Session if it had not been for the prisoner's youth, and the season of the year. If the accused or his counsel wishes the case to be committed, then, in my opinion, the District Magistrate would do well to accede to that wish.

1902
June 20.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

BALBHADDAR NATH AND OTHERS (PLAINTIFFS) *v.* SHEODIHAL AND OTHERS (DEFENDANTS).*

Pre-emption — Mortgage — Mortgage money fraudulently over-stated— Claim of pre-emptor decreed at a lower figure—Suit by mortgagees against mortgagor to recover the difference.

Din Bandhu mortgaged to Sheodihal and others certain property, and the mortgagor and the mortgagees for purposes of their own fraudulently agreed to over-state the consideration for the mortgage. One Shuhrat Singh then brought a pre-emption suit against the parties to the mortgage, and obtained a decree, which allowed him to take over the rights of the mortgagees upon payment of a sum much less than the consideration stated in the bond, which was found by the court to have been largely fictitious. The mortgagees, after the success of Shuhrat Singh's suit, sued the representatives of the mortgagor to recover from them the difference between the price paid by Shuhrat Singh and the consideration mentioned in the deed of mortgage. They based their suit mainly upon a stipulation in the deed, to the effect that if the mortgage money due to the mortgagees was in any way jeopardized, the mortgagees would be entitled to realize it with interest at 9 per cent. per annum, and partly upon general grounds of equity. *Held* that from no point of view were the plaintiffs entitled to succeed. The stipulation in the bond above referred to enured to the benefit of the pre-emptor, and since the plaintiffs had joined with the defendants in misrepresenting the amount of the consideration for the mortgage, they could not be allowed to take advantage of their own wrong.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Durga Charan Banerji*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J. and BANERJI, J.—This appeal has been preferred from the decree of the Additional Subordinate Judge of Gorakhpur, by which he has dismissed the suit brought by the plaintiffs appellants under the following circumstances:—Din Bandhu Pande, the father of the defendants respondents, executed a mortgage in favour of the plaintiffs on the 18th March, 1892, the amount of consideration set forth in the mortgage-deed being Rs. 904. One Shuhrat Singh, a co-sharer

* Second Appeal No. 790 of 1900 from a decree of Babu Ramdhan Rai, Officiating Additional Subordinate Judge of Gorakhpur, dated the 18th of April 1900, reversing a decree of Babu Kalika Singh, Munsif of Bansi, dated the 29th July 1899.

in the village in which the mortgaged property was situate, brought a suit for pre-emption in respect of the mortgage. He alleged that the actual amount of consideration for the mortgage was Rs. 525, and not Rs. 904 as specified in the mortgage-deed. The court found in favour of the then plaintiff, and made a decree for pre-emption conditional upon the payment of Rs. 525. That amount has been received by the plaintiffs; and they now bring the present suit to recover from the defendants Rs. 379, the difference between the amount received by them and the amount of consideratian mentioned in the mortgage-deed. The claim was decreed by the court of first instance, but has been dismissed by the lower appellate Court. The plaintiffs have preferred this appeal.

The claim as laid in the plaint was founded upon a stipulation contained in the mortgage-deed, executed by Din Bandhu, to the effect that if the mortgage money due to the mortgagees was in any way jeopardized, the mortgagees would be entitled to realize it with interest at 9 per cent. per annum. The lower appellate Court held that, as it was not through any act of the defendants' father that the present plaintiffs lost the pre-emption suit, the plaintiffs were not entitled to succeed in their claim upon the basis of the stipulation to which we have referred. We are, however, of opinion that the covenant in the mortgage deed enures in favour of the pre-emptor, who has stepped into the shoes of the mortgagee. If he, as mortgagee, is damnified in any way, he would be entitled to avail himself of the covenant. The plaintiffs, in our opinion, are not entitled to take advantage of it.

It is next urged that as the defendants' father received the full amount of the mortgage, and as the plaintiffs have recovered from the pre-emptor only a portion of it, they are equitably entitled to the balance of the amount advanced by them. This might perhaps have been a valid contention had the full amount of the mortgage money been advanced by the plaintiffs; but the facts of this case show that they did not do so. The consideration for the mortgage consisted of a sum of Rs. 230 paid in cash, and Rs. 674 alleged to have been due by the mortgagor upon a bond executed by him in favour of the plaintiffs in 1887. A

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BALBHADDAR NATH v. SHEODIHAL.

part of the consideration for the bond of 1887 consisted of money which had been left in the hands of the plaintiffs, the obligees of that bond, for the discharge of a debt due to Shuhrat Singh upon a mortgage executed by Din Bandhu. It appears that Shuhrat Singh brought a suit to recover the amount due to him under the void mortgage, and in that suit it was pleaded that the present plaintiffs had, in compliance with the terms of the mortgage deed of 1887, paid off the amount of Shuhrat Singh's mortgage. The court found that plea to be untenable, and held that Shuhrat Singh's mortgage had not been discharged by the present plaintiffs. In the pre-emption suit brought by Shuhrat Singh, to which we have referred, he relied on the fact of the non-payment of the above amount in order to show that the consideration for the mortgage of 1892 had been falsely exaggerated in the mortgage-deed. The present plaintiffs in answer to that contention alleged that they had paid off the amount of Shuhrat Singh's mortgage. The Court repelled that contention and found against them. It is thus clear that the present plaintiffs and the defendants' father joined together in fraudulently representing that the consideration for the mortgage was Rs. 904, and not Rs. 525, the sum found by the Court in the pre-emption suit to be the actual amount of consideration. The plaintiffs and the defendants' father having thus joined together in perpetrating a fraud for the purpose of defeating the rights of pre-emptors, the plaintiffs cannot take advantage of that fraud and maintain the present claim against the defendants. Upon this ground also the plaintiffs' suit was bound to fail.

We therefore affirm the decree of the lower appellate Court, though not for the reasons upon which that decree is founded, and dismiss the appeal with costs.

Appeal dismissed.

1902
June 23.

Before Mr. Justice Aikman.

MATHURA DAS AND OTHERS (DEFENDANTS) *v.* MURLIDHAR (PLAINTIFF).*

Act No. XII of 1881 (*N.-W. P. Rent Act*), *sections* 42, 95, 206—*Landholder and tenant — Ejectment — Appraisement of tenant's crops — Assignment of right to receive price of crops—Mode in which such price can be realized — Jurisdiction — Civil and Revenue Courts — Actionable claim—Act No. IV. of* 1882, *section* 135.

A zamindar ejected a tenant, and having done so, caused the value of the tenant's crops standing on the land to be assessed in the manner provided for by section 42 of the N.-W. P. Rent Act. The tenant assigned his right to get the assessed value of the crops from the zamindar to a third person.

Held on suit by the assignee to recover the amount of the assessment—(1) that the assignee's proper remedy was by suit in a Court of Revenue, and not by application to execute the order awarding compensation; (2) that the suit was not a suit of the nature cognizable by a Court of Small Causes; and (3) that the assignment to the plaintiff after the award had been made was not an assignment of an actionable claim within the meaning of section 135 of Act No. IV of 1882.

THE facts of this case sufficiently appear from the judgment of the court.

Pandit *Sundar Lal*, Pandit *Baldeo Ram* and Babu *Devendra Nath Ohdedar*, for the appellants.

Babu *Jogindro Nath Chaudhri* and Pandit *Madan Mohan Malaviya* (for whom Babu *Beni Madhub Ghosh*), for the respondent.

AIKMAN, J.—The suit out of which this appeal arises is one of a somewhat peculiar nature. The defendants are the appellants here. They are zamindars of a village. Sultan Ali was a tenant of theirs. They ejected him by proceedings under the Rent Act. At the time of the ejectment there were standing crops on the tenant's holding. The zamindars, wishing to acquire those crops, tendered their price to the tenant. The parties not being able to agree as to the price, the zamindars applied to the Rent Court under cl. *(g.)* section 95 of Act No. XII of 1881, to determine the value of the crops. The Assistant Collector fixed the value at Rs. 237. Sultan Ali assigned his rights to receive this sum to one Murlidhar, the plaintiff in this suit. Murlidhar, the

* Second Appeal No. 422 of 1901 from a decree of Lala Shankar Lal, Additional Subordinate Judge of Meerut, dated the 31st January 1901, modifying a decree of Maulvi Muhammad Abbas Ali, Munsif of Meerut, dated the 21st of February 1900.

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MATHURA DAS v. MURLIDHAR.

assignee, brought a suit in the court of the Munsif to recover from the zamindars the amount awarded as the value of the standing crops, together with interest. The lower appellate Court has decreed the greater part of the claim, allowing a small set off on account of rent due to the defendants from the plaintiff's assignor. The defendants come here in second appeal.

A preliminary objection is taken to the hearing of the appeal based upon section 586 of the Code of Civil Procedure, namely, that the suit was one of a nature cognizable in a Court of Small Causes, and the value of the subject-matter did not exceed Rs. 500. In my opinion this preliminary objection must be overruled. Section 42 *(c)* of Act No. XII of 1881 provides that the amount of an award made by an Assistant Collector under cl. *(g)*, section 95, shall be recoverable as an arrear of rent by suit under that Act. This provision clearly excludes the suit from the cognizance of a Court of Small Causes.

The first plea taken in the memorandum of appeal here is, that the assignee's only remedy was an application to the Revenue Court to execute the order of an Assistant Collector appraising the value of the standing crops. In my opinion this plea cannot be sustained. As has been shown above, the mode provided by the Rent Act for recovery of the amount awarded as the price of the standing crops is not by application to execute the award, but by a suit under the Act. It is true that the suit ought to have been brought in the Revenue Court. But no objection to the jurisdiction of the Munsif having been taken, either before the Munsif or in the lower appellate court, such objection cannot now be entertained, and the appeal must be disposed of as if the suit had been instituted in the right court (*vide* section 206 of Act No. XII of 1881). This disposes of the first plea.

The next plea is, that what the assignee acquired was an actionable claim, and that the defendants are entitled to be discharged by paying to the assignee the price and the incidental expenses of the sale of the claim with interest. This plea is based upon section 135 of the Transfer of Property Act No. IV of 1882. In my opinion this plea likewise fails, having regard to the provisions of cl. *(d)* of the above mentioned section, which provides that where the judgment of a competent court

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has been delivered affirming the claim, the provision as to the discharge of actionable claims does not apply. Here a competent court, namely, the court of the Assistant Collector, has delivered judgment affirming the claim. These are the only two grounds in the memorandum of appeal. I therefore dismiss the appeal with costs.

An objection has been taken by the plaintiff-respondent under the provisions of section 561 of the Code of Civil Procedure, to the set off which has been allowed by the lower appellate Court. That objection is clearly without force. The landholders were entitled to set off against the price of crops, the amount of the rent payable by the plaintiff's assignor—[*vide* cl. *(d)*, section 42 of the Rent Act.] The result is that I dismiss both the appeal and the objection with costs.

Appeal dismissed.

1902
June 24.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Knox.

RAM ADHAR AND ANOTHER (JUDGMENT-DEBTORS) *v.* NARAIN DAS (AUCTION PURCHASER).*

Execution of decree—Objection by judgment-debtor that more had been delivered to the auction-purchaser than was included in his sale certificate—Objection disallowed—Appeal—Civil Procedure Code, section 244.

Certain landed property was put up for sale in execution of a decree. On the property stood a house. After the sale the auction purchaser obtained possession of the house. The judgment-debtors objected that the house should not have been delivered, inasmuch as no mention was made of it in the sale certificate. This objection was disallowed. *Held*, that the order disallowing the judgment-debtor's objection did not fall within section 244 of the Code of Civil Procedure, and was not otherwise appealable. *Mammod* v. *Locke* (1) and *Hira Lal Chatterji* v. *Gourmoni Debi* (2) referred to.

IN this case one Ram Shankar, holding a decree against Ram Adhar and another, caused certain land belonging to the judgment-debtors to be sold by auction in execution of his decree. Upon this land there stood a building described as a "dera," and this building was sold with the land, and the auction purchaser, Narain Das, was put in possession. The judgment-debtors filed

* First Appeal No. 15 of 1902 from a decree of Munshi Shiva Sahai, Subordinate Judge of Cawnpore, dated the 16th of October 1901.

(1) (1897) I. L. R., 20 Mad., 487. (2) (1886) I. L. R., 13 Calc., 326.

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RAM ADHAR v. NARAIN DAS.

an objection in the executing court, alleging that the building was in fact a dwelling-house and could not be, and was not, sold with the land, and ought not to have been made over to the auction purchaser. The Court of first instance (Subordinate Judge of Cawnpore) dismissed the application of the judgment-debtors, on the ground mainly that the objection was not one which could be entertained under section 244 of the Code of Civil Procedure, especially after the sale had been completed, and that the building was not in fact, as the judgment-debtors asserted, a dwelling-house.

The judgment-debtors thereupon appealed to the High Court.

Babu *Satya Chandra Mukerji*, for the appellants.

Pandit *Sundar Lal* (for whom Pandit *Baldeo Ram Dáve*), for the respondent.

STANLEY, C. J., and KNOX, J.—A preliminary objection is taken to the hearing of this appeal, on the ground that no appeal lies. The facts, so far as they are necessary for the objection, are as follows:—Certain property had been put up for sale in execution of a decree—that property was landed property. Upon the property stood a house. After sale the auction purchaser obtained possession of the house. The judgment-debtors then objected that the house should not have been delivered over, on the ground that no mention of it was made in the sale certificate. The Court below came to the conclusion that as possession had been delivered, be the order a proper or improper one, it could not interfere. The respondent takes a preliminary objection to the effect that the order of the Court below is not an order under section 244, inasmuch as it is not an order made between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree. The appellants' learned vakil was at first disposed to question this, but on his being referred to the case of *Mammod* v. *Locke* (1) and the case of *Hira Lal Chatterji* v. *Gourmoni Devi* (2), he was no longer prepared to sustain his appeal. The result is that this appeal must be dismissed with costs.

Appeal dismissed.

(1) (1897) I. L. R., 20 Mad., 487. (2) (1886) I. L. R., 13 Calc., 326.

PRIVY COUNCIL.

P. C.
1902
June 10, 11.
July 22.

PARTAB BAHADUR SINGH, MINOR, BY HIS NEXT FRIEND JAGMOHAN SINGH (DEFENDANT) *v.* GAJADHAR BAKHSH SINGH (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mortgage—Suit for redemption—Stipulation for interest until principal paid off—Mortgagee in possession and in receipt of rents and profits—Reduction of mortgagee's security by acts beyond mortgagor's control—Acquiescence of mortgagee.

The plaintiff mortgaged to the defendant twelve villages, and stipulated in the mortgage deed that "until delivery of possession of the aforesaid villages I shall pay interest at the rate of 2 per cent. on the mortgage money," and that "until I pay up the Rs. 5,600 on account of principal with interest to the very last pie the mortgagee shall continue in possession and occupation of the villages." Possession of the villages was given to the mortgagee at the time of the execution of the mortgage; but a reduction in the number of villages in his possession was caused by a grant by the native Government in 1853, and settlements in 1858 and 1864 in favour of other persons. By a lease executed at the same time as the mortgage some of the villages were leased to the plaintiff who thus became the tenant of the mortgagee, and paid rent in lieu of interest. *Held* in a suit for redemption that the interest referred to in the mortgage deed was only interest until possession was given of the mortgaged property: the mortgagee after possession took the rents and profits instead of interest, and the plaintiff was entitled to redemption on payment of the principal sum of Rs. 5,600 only.

Held also that no difference to this result was caused by the reduction in the number of villages held by the mortgagee, which did not constitute a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property such as entitled the mortgagee to claim interest in lieu of the rents and profits of those villages of which he was so dispossessed. The settlements were final as to the ownership of the mortgaged property, and the mortgagee having brought no suit, as he might have when his security became diminished, must be taken to have acquiesced in his dispossession.

APPEAL from a decree (20th November, 1897) of the Court of the Judicial Commissioner of Oudh, which varied in favour of the respondent a decree (30th April, 1895) of the Subordinate Judge of Sultanpur, in a suit brought by the respondent.

The plaintiff, as representative of one Indarjit Singh, sued the defendant as representative of Raja Sarnam Singh, Taluqdar of Gaura Katari, to redeem a mortgage of the following five villages, (1) Hargaon, (2) Ahed, (3) Macharia, (4) Bahadurpur, (5) Poorab Pershad Badal.

Present:—Lord DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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On the 15th of June, 1851, Indarjit Singh borrowed Rs. 5,600 from Sarnam Singh, and as security mortgaged to him the above five villages together with seven others, *viz.* (6) Poorab Adhar, (7) Ajabgarh, (8) Rudgarh, (9) Kapasi, (10) Sheogarh or Sheopur, (11) Baghiapur, and (12) Poorab Kohli. The material clause in the mortgage deed is set out in their Lordships' judgment.

On the same date Raja Sarnam Singh executed a perpetual lease of the first-named five villages and of Poorab Adhar in favour of Indarjit Singh at a yearly rental of Rs. 2,801, from which amount Indarjit was to be allowed Rs. 800 per annum as *nankar* or subsistence allowance. The lease was to take effect from 1259 Fasli = the 11th of September, 1851.

On the 18th of September, 1853, one Hanuman Prasad obtained lease from the King of Oudh of the whole taluqa of Bhawan Shahpur, in which the above-named 12 villages were incorporated, and forcibly took possession of them, which he retained until the annexation of Oudh in 1856. At the first summary settlement the villages leased on the 15th of June, 1851, were settled with Indarjit Singh, but the other six villages were settled with other persons. After the confiscation of Oudh in March, 1858, the second summary settlement was made on the basis of proprietary right, and at this settlement a decree for the five villages in suit was passed in favour of Indarjit Singh. Poorab Adhar was settled with other persons, and the remaining six villages included in the mortgage were decreed to Babu Sitla Bakhsh, taluqdar of Bhawan Shahpur. Raja Sarnam Singh had petitioned for settlement of the twelve villages by virtue of the mortgage of the 15th of June, 1851, but his claim was rejected. At the regular settlement in 1864 he sued again for a recognition of his rights, and on the 30th of June judgment was delivered as follows:—

"I decree proprietary right of the following—Macharia, Bahadurpur, Hargaon, Poorab Pershad, and Ahed—in favour of Indarjit Singh, and direct that Raja Sarnam Singh's name be entered, as in possession under bond, dated the 15th of June, 1851, while Indarjit Singh is entitled to hold lease of the villages in question according to the terms of the deed of agreement (the

lease of the 15th of June, 1851), which must be considered as binding on the parties. I presume Indarjit Singh will be able to redeem any time within 30 years."

From the 30th of June, 1864, the taluqdar was paid the rent, *viz.* Rs. 2,001 per annum, reserved by the lease. By order of the 26th of September, 1867, the lessee was directed to pay a further sum of Rs. 166 as pay of chaukidars.

Raja Sarnam Singh died in 1877 and Indarjit Singh in 1884.

The suit out of which the present appeal arose was brought on the 25th of June, 1894, by the representative of Indarjit Singh, to redeem the mortgage of the five villages. In his plaint the plaintiff stated "that Raja Sarnam Singh, while holding possession as mortgagee of villages Ajabgarh, Rudgarh, Kapasi, Sheogarh, Baghiapur, and Poorab Kohli allowed Babu Jageshar Bakhsh Singh to take possession of the said villages and to include them in his taluqa, although he ought to have protected Babu Indarjit Singh's rights in the aforesaid villages, and continued his possession until redemption as provided in the mortgage deed. Hence, having failed in his duties as mortgagee in possession, Raja Sarnam Singh allowed Babu Indarjit Singh's rights in the said villages to be lost". The plaintiff, therefore, claimed to set off the value of these villages against the mortgage money. He also alleged that possession of the whole of the mortgaged property was delivered to the mortgagee on the 15th of June, 1851, and contended that on the true construction of the mortgage deed no interest was payable, even though the whole or a portion of the security had been lost.

The defendant, who was the representative of Sarnam Singh, in his written statement denied that Indarjit Singh ever had any title to the villages mortgaged other than those in suit. He denied that possession of all the mortgaged villages was delivered to him in pursuance of the mortgage. As he had been deprived of a great portion of the security, he claimed on redemption to charge interest at the rate of 2 per cent. per month on the principal, and credit to the mortgagor all payments made by him in excess of the Government revenue and cesses. He also claimed the sum of Rs. 105 per annum, from the 30th of June, 1864, to the year 1868, payments made by him to the Government.

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He also denied any responsibility for the loss of the six villages not covered by the lease.

The Subordinate Judge decided that only the villages in suit, and Poorab Adhar were the property of Indarjit Singh, and that he had never had any title to the remaining six villages; that those six villages were not lost in consequence of any negligence for which the mortgagee could be responsible; that the loss could be considered in a suit for redemption, and that the value of the six villages was at least Rs. 14,160. He was of opinion that the mortgagee was not put into possession of these six villages and of Poorab Adhar on the execution of the mortgage deed. He held that there was no proof of any payments in the years 1259 Fasli and 1260 Fasli, and that the mortgagee could not charge Rs. 105 per annum from 1864 to 1868. He decided that the mortgagee not having been put into possession of the entire property mortgaged, he was entitled to charge as interest or damages 2 per cent. per mensem on the principal, giving the mortgagor credit for payments made in excess of the Government revenue and cesses; and as there were no such payments, he decreed redemption on payment of Rs. 5,600 principal, Rs. 57,792 interest up to the 13th of June, 1894, and the costs of the suit.

From this decree the plaintiff appealed to the Court of the Judicial Commissioners of Oudh. That Court decided that the title of Indarjit Singh was limited to the five villages in suit; that the loss of the remaining villages was not due to any neglect on the part of the mortgagee, and that he was, therefore, not responsible to the mortgagor. The Judicial Commissioners reversed the finding of the Subordinate Judge in this respect, and held it proved that on the execution of the mortgage deed Rajá Sarnam Singh was placed in possession of all the twelve villages as mortgagee. On the construction of the mortgage they were of opinion that the mortgagor covenanted to pay interest at 2 per cent. per mensem until possession of the mortgaged villages was delivered to the mortgagee, after which interest ceased, the mortgagee being then entitled to the rents and profits of the property in lieu of interest, and that redemption was to be effected on payment of the principal sum Rs. 5,600 together with such interest as might have accrued until delivery of possession.

As to this, and as to the legal effect of the mortgagee being deprived of the rents and profits in lieu of interest in consequence of the failure of the mortgagor to secure his possession, the Judicial Commissioners said :—

"Both the parties admit that their respective rights and liabilities should be determined under the provisions of Act IV of 1882.

"It appears to me that under the provisions of this Act the defendant cannot successfully contest the claim to redeem the mortgage of the property in suit on payment of the principal sum alone (Rs. 5,600).

"Had possession of only a part of the mortgaged property been given to the mortgagee, interest would, I think, have been payable by the plaintiff under the terms of the mortgage, from the date of the mortgage up to the date of suit, as contended by the defendant, an account being taken of that portion of the mortgaged property of which the mortgagee was placed in possession. This, I may observe, was the only ground upon which the interest of Rs. 57,792 was claimed by the defendant in his written statement. But in the present case possession of the entire mortgaged property was delivered to the mortgagee. Under the terms of the contract of mortgage the mortgagor covenanted to pay interest at 2 per cent. per mensem up to the date of delivery of possession of the mortgaged property *(i.e.* the entire mortgaged property). He did not agree to pay interest after delivery of possession, the arrangement being that after such delivery of possession, the mortgagee should enjoy the rents and profits. There was thus no question of accounts after delivery of possession; and the mortgage was redeemable at any time on payment of the principal together with such interest as might have accrued until delivery of possession. It appears to me that in a mortgage of this nature, the mortgagor is, under sections 60 and 62 of Act IV of 1882, entitled to redemption on payment of the principal only (no interest having accrued between the date of the mortgage and delivery of possession), irrespective of the fact that subsequent to delivery of possession he failed to secure to the mortgagee continuance of possession in regard to part of the mortgaged property: there being no provision in the deed for the payment of interest after delivery of possession, or if, after obtaining possession, the mortgagee was deprived of the possession of the whole or any portion of the mortgaged property. The mortgagee on being deprived of the possession of the whole or part of the mortgaged property had his remedies by suit against the mortgagor for the recovery either of the possession of the property, or of the mortgage-money, with perhaps damages (section 68 of Act IV of 1882). I can find no provision in Act IV of 1882 which authorizes him to charge against the mortgagor in the suit for redemption the rents and profits which he would have obtained, had his possession not been disturbed, or interest, as damages, on account of such loss of profits. The mortgagee in the present case was well aware in 1864 that he could not possibly recover possession of the six villages which were settled at the second summary settlement with the Taluqdar of Bhawan Shahpur. He brought no suit then, or at any time subsequently, to recover his mortgage-money [section 68*(c)* of Act IV of 1882], but appears to have remained

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satisfied for 31 years with the diminished security, and the possession of the remaining six villages; and I do not think that the redemption of the mortgage of these villages in suit is subject to the payment by the mortgagor, in addition to the mortgage-money, of a sum of money in compensation for the loss of the profits and rents of the other six mortgaged villages, of the possession of which the mortgagee was deprived in 1231 Fasli (1854 A.D.).

In the result a decree was made for redemption of six villages on payment of Rs. 5,600 only, and each party was directed to pay his own costs in both courts.

From the decree of the Judicial Commissioners the defendant appealed to His Majesty in Council.

Mr. *DeGruyther*, for the appellant, contended that the respondent, the mortgagor, had failed to secure possession to the appellant of the whole of the villages mortgaged, and as he did not therefore get the benefit of the rents and profits as it was intended he should do, of those of which he was dispossessed, he was entitled to interest, which was expressly stipulated for in the mortgage deed, in lieu of the profits of such of the villages as he had been deprived of. An implied contract must be inferred that the mortgagee was to repay himself by taking the profits which is the case in usufructuary mortgages [see section 58, clause *(d)* of the Transfer of Property Act, IV of 1882]. The mortgagor having failed to keep the appellant in possession of a portion of the mortgaged property, should not have been allowed to redeem without payment of either interest or damages for breach of covenant. [LORD DAVEY: Ought not a suit to have been brought for the mortgage money and interest when, according to the appellant's case, it was found that possession of some of the villages could not be secured? If it was a condition that the mortgagor was to guarantee title and that failed, and the appellant did not then sue, is that not a waiver of his rights (if any) leading to the inference that he advanced the money for better or worse, and, if so, can he now claim what he has given up?] Assuming the property to have been totally lost, it s submitted that the mortgagor would have had to bear the loss, as there is in the contract an express stipulation to repay the money with interest. The appellant was not entitled to sue for damages in 1864; but now that a suit is brought against him to recover the property, it is submitted that he, having suffered loss from being deprive l

of possession of part of the property, is not to continue to suffer loss by the mortgagor being allowed to recover the property on payment of only the principal money advanced. The Transfer of Property Act is not exhaustive as to the law; it expressly states that it is intended to amend part of the law. The appellant, therefore, should not suffer for failing to exercise his rights under section 68, which merely gives an additional remedy to the mortgagee. Moreover, in Oudh if there is no express law on any point, the case is to be decided according to equity and good conscience. The case of *Narain Singh* v. *Shimbhoo Singh*, (1) was referred to. Redemption should only be decreed on payment by the respondent, for the time during which the appellant was not in possession of the entire mortgaged property, of interest at 2 per cent. per month on Rs. 5,600, calculated up to the time of redemption, or on payment of a sum equivalent to the profits of that portion of the mortgaged property the possession of which was not secured to the mortgagee. The decree of the Judicial Commissioner is also erroneous in awarding possession of six villages, though possession of five only is claimed in the plaint.

Mr. *Herbert Cowell* for the respondent submitted that the right construction had been put on the mortgage-deed by the Judicial Commissioner. The appellant was not entitled to put forward a contention which had never before been raised or suggested in the transaction until the respondent sued, and which, if successful, would give him interest for a long period at 24 per cent. There was no defect in the respondent's title, nor was it by any cause subject to his control that the appellant had been deprived of possession of some of the mortgaged villages. The proper remedy of the appellant was to have had the arrangement altered in 1864, if he was then dissatisfied with it. He ought to have exercised his option then, when he knew there was no chance of his recovering the portion of the property of which he had been dispossessed: he must in fact be considered to have done so. He then elected to wait, and by such action he confirmed rather than repudiated the mortgage. The decree appealed from is, it is submitted, correct in allowing the respondent to redeem

(1) (1876) I. L. R., 1 All., 325 (330, 332): L. R., 4 I. A., 15(21).

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on payment of no more than the amount of the principal sum due on the mortgage.

Mr. *DeGruyther* replied:—

1902, July 22.—Their Lordships' judgment was delivered by SIR ANDREW SCOBLE:—

The father of the respondent, one Indarjit Singh, a zamindar of Oudh, in the year 1851, mortgaged twelve villages in which he had proprietary rights to Raja Sarnam Singh, the ancestor of the appellant, to secure an advance of Rs. 5,600. The mortgage-deed is dated on the 15th of June, 1851, and the material clause is in these terms:—

"I do hereby mortgage the following villages to the said Raja Sarnam Singh at Rs. 2 per cent. interest, and promise and put down in writing that until delivery of possession of the aforesaid villages to the Raja Sahib mentioned above, I shall pay interest at the rate of Rs. 2 per cent. on the abovementioned mortgage money; that, until I pay up the sum of Rs. 5,600 on account of principal, with interest to the very last pie, Raja Sarnam Singh shall continue in possession and occupation (of the aforesaid villages), and that I shall put forward no excuse or objection."

It may here be noted that the learned Judicial Commissioner found that possession of the entire mortgaged property was delivered to the mortgagee on the execution of the mortgage, and that this finding was not disputed before their Lordships.

By an instrument of even date with the mortgage deed, Raja Sarnam Singh the mortgagee leased to the mortgagor, Indarjit Singh, six of the mortgaged villages at a consolidated rental of Rs. 2,801 per annum, less Rs. 800 per annum allowed to the lessee as *nankar*. The lease was to take effect from the 11th of September, 1851.

On the 18th of September, 1853, one Hanuman Prasad obtained a *kabuliat* from the King of Oudh of the taluqa of Bhawan Shahpur, in which the twelve mortgaged villages were included, and forcibly dispossessed Raja Sarnam Singh, the mortgagee and previous *kabuliat*-holder. The circumstances of this transaction are not very clear; but Charan Singh, one of the witnesses for the plaintiff, gives a characteristic explanation:—

"In *Nawabi* might was the right, and *kabuliats* were executed by anyone. There was none to hear any grievances, and the *kabuliatdar* forcibly ejected the previous holder." Whatever his title may have been, Hanuman Prasad remained in possession until the annexation of Oudh by the British Government in 1856.

The procedure adopted by that Government for the purpose of ascertaining rights of property in land in the territories annexed is matter of history, and has frequently formed the subject of consideration by this Committee. The first summary settlement was made with the persons actually in possession, and decided nothing as to ownership. At the second summary settlement, which was made in 1858, on the basis of proprietary right, the name of Indarjit Singh was entered in respect of the five villages now in suit, while of the remaining seven villages of the twelve originally mortgaged, six were entered in the name of the Taluqdar of Bhawan Shahpur, and one (Poorab Adhar) in the names of Hubdar Singh and Sukram Singh, who claimed under a mortgage of earlier date than that to Sarnam Singh. On the 11th of December, 1858, Sarnam Singh filed a petition in the Settlement Court, praying that the settlement of the whole twelve villages might be made with him; but his application appears to have been made too late, for it was ordered that "as the settlement of this village is over, and the applicant did not appear at the time the settlement was going on, and as it appears from the application and the statement of the applicant that this matter relates to a mortgage, hence it is ordered that if the applicant has any claim, he must sue in the Civil Court."

Sarnam Singh took no proceedings in the Civil Court, and no further action was taken until the regular settlement, which was made in 1864, when both mortgagor and mortgagee claimed to be proprietors of the twelve mortgaged villages. After inquiry the Assistant Settlement Officer, on the 3rd of June, 1864, decreed proprietary right of the five villages now in question in favour of Indarjit Singh, and directed that Raja Sarnam Singh's name be entered as in possession under the mortgage bond of the 15th of June, 1851, while Indarjit Singh was declared

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entitled to hold lease of the five villages according to the terms of the agreement of the same date, "which must be considered as binding on the parties." This decision was appealed against, but was eventually confirmed by the Superior Revenue Authorities with the result that the parties remained in the relation constituted by the mortgage-bond and lease, with the exception that the mortgagee was left with five villages only, instead of twelve, as security for his advance.

In 1866 and 1867 there was litigation between the mortgagor and mortgagee as to liability for certain charges upon the land, in which both parties relied on the mortgage-bond and lease as constituting the contract between them; and it is admitted that, after the determination of their respective rights by the decrees of the Settlement Courts, the rent reserved by the lease and the charges allowed were paid by the respondent and his predecessor in title to the appellant and his predecessors in title.

Raja Sarnam Singh died on the 18th of May, 1877, and Indarjit Singh died on the 2nd of May, 1884. The appellant and respondent are their heirs respectively.

On the 25th of June, 1894, the respondent filed the present suit to redeem the mortgage, and the sole question now between the parties is as to the terms on which redemption should be decreed —the respondent contending that he is entitled to redeem on payment of the amount originally advanced, while the appellant claims in addition interest at the rate of 2 per cent. per month upon that amount for the period during which the mortgagee was not in possession of the entire mortgaged estate up to the date of redemption.

The Subordinate Judge of Sultanpur, before whom the suit came in the first instance, found in favour of the appellant on this point; but his decree was reversed on appeal by the Judicial Commissioners of Oudh, who decreed the claim for the redemption of the mortgage of the villages in suit on payment of Rs. 5,600 only.

It appears to their Lordships that this decision is right. The only provision in the mortgage bond as to interest is in these words:—"Until delivery of possession of the aforesaid villages to the Raja Sahib . . . I shall pay interest at the rate of 2 per

cent. on the abovementioned mortgage-money", and the subsequent words "until I pay up the sum of Rs. 5,600 on account of principal, with interest to the very last pie," must be read to refer to interest as previously stipulated, namely, until possession was given of the mortgaged property. The mortgage was of the class known as usufructuary mortgages, which are not uncommon in India, and in which possession of the mortgaged property is delivered to the mortgagee who takes the rents and profits in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest and partly in payment of the mortgage-money [Act IV of 1882, section 58(*d*)]. In this case the arrangement between the parties was completed by the execution of a lease, under which the mortgagor became the tenant of the mortgagee, and paid rent in lieu of interest. Under such a mortgage the mortgagee takes his chance of the rents and profits being greater or less than the interest which might have been reserved by the bond, and the mortgagor is entitled to redeem on repayment of the mortgage-money.

But it was contended that, although possession of the twelve villages originally mortgaged was given at the time of the execution of the mortgage, the reduction of their number to six in 1853 by the grant to Hanuman Prasad, and to five by the settlements of 1858 and 1864, constituted a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property, which entitled the mortgagee to claim interest in lieu of the rents and profits of the property of which he was dispossessed. In the opinion of their Lordships, it is a sufficient answer to this argument to say that the mortgagee appears to have acquiesced in his dispossession by Hanuman Prasad (as to which he probably had no alternative), and that the decisions of the Settlement Courts in 1858 and 1864 were final as to the ownership of the mortgaged property. As the learned Judicial Commissioner observes, "the mortgagee was well aware in 1864 that he could not possibly recover possession of the villages . . . which were settled at the second summary settlement. He brought no suit then, or at any time subsequently, to recover his mortgage-money, but appears to have remained satisfied for 31 years with the diminished security, and the possession of the

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remaining villages." It may be added that he made no attempt to enhance the rent of the villages which were left to him, and that they constitute an ample security for the whole amount of his claim.

In the judgment of the Judicial Commissioner, it is inadvertently stated that the villages now in suit are six in number; but this is erroneous. As already pointed out, at the Settlements of 1858 and 1864, Indarjit Singh was confirmed in the proprietorship of five only, and the decree must be varied accordingly. Their Lordships will therefore humbly advise His Majesty that the decree of the Court of the Judicial Commissioner of Oudh, so far as it relates to the five villages of Hargaon, Ahed, Macharia, Bahadurpur, and Poorab Pershad Badal, should be confirmed, and this appeal dismissed. The appellant must pay the respondent's costs of this appeal.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent—Messrs. *Barrow, Rogers, & Nevill.*

J. V. W.

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FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Banerji, and Mr. Justice Burkitt.

JAMNA BIBI (APPLICANT) *v.* SHEIKH JHAU AND ANOTHER (OPPOSITE PARTIES).*

Civil Procedure Code, sections 2, 372, 588(21)—*Application to be brought on to record of appeal as assignee of deceased appellant—Application rejected—No appeal from order rejecting application.*

Held that no appeal would lie from an order rejecting the application of a person who claimed to be brought on to the record of an appeal as being the assignee of the deceased sole appellant. *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (1) followed. *Moti Ram* v. *Kundan Lal* (2) overruled. *Indo Mati* v. *Gaya Prasad* (3) explained and distinguished.

THE facts out of which this appeal arose were as follows:—

One Musammat Bholi Bibi brought a suit against Sheikh Jhau and Baijnath Prasad for a declaration that certain property

* First Appeal No. 124 from an order of W. Tudball, Esq., District Judge of Gorakhpur, dated the 17th August, 1901.

(1) (1900) 4 C. W. N., 403. (2) (1900) I. L. R., 22 All., 380.
(3) (1896) I. L. R., 19 All., 142.

was not liable to be sold in execution of a decree obtained by Baijnath Prasad against Sheikh Jhau. The Court of first instance dismissed the suit. Musammat Bholi Bibi appealed. Whilst the appeal was pending she, by means of a parole gift, assigned all her rights in the subject-matter of the suit to one Musammat Jamna Bibi. After this alleged assignment Musammat Bholi Bibi died. Musammat Jamna Bibi thereupon applied that her name should be brought upon the record in place of that of Musammat Bholi Bibi as the latter's legal representative by virtue of the oral gift which she alleged Musammat Bholi Bibi had made in her favour. This application was refused by the District Judge, and against such order of refusal Musammat Jamna Bibi appealed to the High Court.

At the first hearing of this appeal before a Division Bench (Banerji and Aikman, JJ.) a preliminary objection was taken by the vakil for the respondents that no appeal lay. This objection was supported by the ruling of the Calcutta High Court in *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (1). The appellant relied upon the ruling in *Moti Ram* v. *Kundan Lal* (2). This latter ruling supported the appellant's position, but the Division Bench entertained doubts as to its correctness, and accordingly directed that the appeal should be laid before the Chief Justice in order that a larger Bench might be appointed to decide it. In accordance with this recommendation a Bench consisting of the Chief Justice and Banerji and Burkitt, JJ. was appointed, and the appeal was reheard.

On this hearing Munshi *Gobind Prasad*, for the respondents, raised a preliminary objection that no appeal lay, the order in question being neither a decree within the meaning of section 2 of the Code of Civil Procedure nor an order appealable under section 588 of the Code. Only orders under section 372 of the Code disallowing objection are appealable, and not orders rejecting applications under that section. The order in question is not an adjudication which, so far as the Court expressing it is concerned, decides the suit or appeal; hence no appeal lies. Reference was made to the case of *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (1).

(1) (1900) 4 C. W. N., 403. (2) (1900) I. L. R., 22 All., 380.

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Maulvi *Muhammad Ishaq*, for the appellant, contended that the application made by Musammat Jamna Bibi to be brought upon the record in place of Musammat Bholi Bibi on the ground that she was the assignee of the latter was an application under section 365 of the Code of Civil Procedure, and the order of the Court disallowing such application was an order under section 367, from which an appeal would lie by virtue of section 588(18). The term "legal representative" was wide enough to include an assignee; and all orders deciding questions legitimately arising under section 367 are appealable under section 588(18). Section 365 does not specify, and therefore limit, the grounds upon which an application can be made by the legal representative: an assignment would be as good a ground as succession by right of inheritance. Even if the order falls under section 372, it must be deemed to be a decree and would be appealable as such. I rely on the ruling in *Moti Ram* v. *Kundan Lal* (1).

The judgment of the Full Bench was as follows:—

In this case one Musammat Bholi Bibi instituted a suit against Binda Prasad and Sheikh Jhau, her son, for a declaration that certain shares in two villages were not liable to be sold in execution of a decree obtained by one Baijnath against her son, Sheikh Jhau. The lower Court dismissed the suit, and thereupon Bholi Bibi appealed, but died before the determination of the appeal. Musammat Jamna Bibi applied to the Court to be brought on the record in the place of Bholi Bibi, alleging that she was the assignee of the shares in the property in dispute under a parole gift made to her by Bholi Bibi prior to her death. The District Judge found that the alleged assignment was not proved, and refused the application. Hence the present appeal.

The appeal came before a Bench of this Court, when a preliminary objection was taken by the learned vakil for the respondents to the hearing of the appeal, on the ground that the order of the District Judge being one under section 372 of the Code of Civil Procedure, and not being one disallowing an objection made under that section, no appeal lay. There is a conflict in the rulings of a Bench of this High Court in the case of *Moti*

(1) (1900) I. L. R., 22 All., 380.

Ram v. *Kundan Lal* (1), and of a Bench of the High Court at Calcutta in the case of *Lalit Mohan Roy* v. *Shebock Chand Chowdhry* (2). The Bench before whom the present appeal came considered that the decision in the former case was open to grave doubt, and thought it desirable to have the appeal referred to a larger Bench for determination. Accordingly the appeal has come before us.

In the case of *Moti Ram* v. *Kundan Lal*, to which we have referred, the facts were as follows:—A defendant, pending suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* unfavourably to the assignees. Thereupon the assignees filed a memorandum of appeal, claiming to be entitled to file an appeal under the circumstances set forth in their memorandum. Their application was supported by the assignor, who disclaimed all interest in the subject-matter of the suit. The District Judge treated the application for leave to appeal as if it were an application properly made under section 372 of the Code of Civil Procedure, but in his final order recorded that the applicants applied to be allowed to appeal under no section whatever; and because they had taken no steps to have their names entered apparently before the decree was passed, held that they had no *locus standi* then, and he accordingly rejected the application for leave to appeal. On appeal the matter came before a Division Bench of this Court, which held that the District Judge was wrong in refusing the application, and that section 372 clearly applied to such a case. In arriving at this conclusion they adopted the decision in the case of *Indo Mati* v. *Gaya Prasad* (3) as being an authority upon the question, and held that an appeal did lie from an order rejecting an application made under section 372.

In the case of *Indo Mati* v. *Gaya Prasad* the facts were shortly as follows:—Gaya Prasad and another had obtained a decree for sale on a mortgage against one Chaudhri Raj Kunwar, who was the husband of Rani Indo Mati. After the death

(1) (1900) I. L. R., 22 All., 380. (2) (1900) 4 C. W. N., 403.
(3) (1896) I. L. R., 19 All., 142.

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of her husband Rani Indo Mati applied to the Court, stating that the property to which the decree applied had devolved upon her under the will of one Rani Lachmin Kuar, to whom it had been transferred on the 19th of September, 1895, and praying that she might be made a party to the execution proceedings, and that under section 87 of the Transfer of Property Act six months' time might be granted to her in which to make arrangements for satisfying the decree. Upon this application the Subordinate Judge passed the following order :—"This is not an application on behalf of a party to the suit, but on behalf of a third person. Time has been granted twice. It cannot be granted now. It is ordered that the application be rejected." On appeal from this order to the High Court, Edge, C.J. and Blair, J., set aside the order holding that it was a decree within the meaning of section 2 of the Code, and that an appeal lay from it. In the course of their judgment the learned Judges observed :—"It appears to us that the dismissal of her, *i.e.* (Rani Indo Mati's) application was an adjudication on the representative right which she claimed, and as an order under section 372 dismissing an application is not an order specified in section 588, the order dismissing her application would be a decree, as that word is defined in section 2 of the Code of Civil Procedure, and in our opinion an appeal lay *the case coming within section* 244 *of the Code.*" It is to be observed in this case that a decree had already been obtained, and consequently the application of the appellant came within section 244, the question being one between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree or to the stay of the execution thereof. It appears to have escaped the notice of the Bench which decided the case of *Moti Ram* v. *Kundan Lal* that the case of *Indo Mati* v. *Gaya Prasad* was one coming within section 244 of the Code. The head-note to the case is misleading, as it contains no reference to the fact that a decree in the suit had already been passed, and that the case therefore fell under the provisions of section 244. It would appear from it that the Court decided that an appeal lay from an order dismissing an application under section 372 in all cases, but it did not

do so. Whether it properly treated the question as one coming within section 372 at all is open to doubt.

Now the order dismissing the application under section 372 now appealed against is, in our opinion, clearly not a decree within the meaning of section 2 of the Code of Civil Procedure; although it amounted to an adjudication upon the right claimed by the appellant to be made a party to the suit, it was in no sense an adjudication which decided the suit so far as regards the Court expressing it. The suit has not yet been decided. It may be, so far as we know, that some party who is in a position to establish his right as assignee may apply to the Court, and have his name added to the record and proceed with the disposal of the suit. The order clearly does not come within section 588 (sub-section 21), inasmuch as it was not an order disallowing an objection under section 372. But then it is contended that the application is in reality an application under section 365 of the Code which, in the case of the death of a sole plaintiff or sole surviving plaintiff, enables the legal representatives of the deceased, where the right to sue survives, to appeal to the Court to have his name entered on the record in place of the deceased plaintiff. This section is clearly, in our opinion, not applicable, inasmuch as the appellant here is not the legal representative of the deceased plaintiff, as she does not in law represent the estate of the deceased. Her claim is that of an assignee, and not that of a legal representative. This question recently came before a Bench of the High Court at Calcutta in the case to which we have referred of *Lalit Mohan Roy* v. *Shebock Chand Chowdhry*, in which the facts were in all respects similar to the facts of the present case, when it was held by a Bench consisting of Rampini and Wilkins, JJ., that an order disallowing an application of a person claiming under section 372 to be made a party defendant as assignee of the defendant was not a decree within the meaning of section 2 of the Code, and that no appeal lay against such an order. We concur in this ruling. It is difficult to understand why an appeal is not allowed in such a case when an appeal is expressly permitted when an order is passed disallowing objections under section 372. Great hardship may no doubt arise from the fact that there is no such appeal. This is, however, not a

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consideration which can weigh with us in interpreting the law. For the foregoing reasons we allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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July 4.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

SHAM DAS AND ANOTHER (DEFENDANTS) *v.* BATUL BIBI (PLAINTIFF).*

Mortgage—Usufructuary mortgage of zamindari and sir—Loss by mortgagor of proprietary rights—Mortgage to take effect against ex-proprietary rights of mortgagor—Mortgagor not entitled to relinquish ex-proprietary rights to the zamindar—Act No. XII of 1881 *(N.-W. P. Rent Act), section* 31.

A zamindar having mortgaged by way of usufructuary mortgage his zamindari together with his *sir* land, lost his zamindari rights and became an ex-proprietary tenant of the *sir*. *Held* that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex-proprietary rights. *Moody* v. *Mathews* (1), *Hughes* v. *Howard* (2), *Trumper* v. *Trumper* (3), *Khiali Ram* v. *Nathu Lal* (4) and *Sukru* v. *Tafazzul Husain Khan* (5) referred to.

Held also that in such a case as above the mortgagor, ex-proprietary tenant, could not to the prejudice of the mortgagee, surrender to the zamindar his ex-proprietary interest. *Badri Prasad* v. *Sheo Dhian* (6) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *G. W. Dillon*, for the appellants.

Maulvi *Ghulam Mujtaba*, for the respondent.

STANLEY, C.J. and BANERJI, J.—One Rajab Ali was entitled to a share of zamindari property and *sir* lands appertaining to it. On the 25th of January, 1890, he mortgaged it to the plaintiff, and in the years 1893 and 1895 he also granted usufructuary mortgages in favour of the defendants of the same property. The defendants brought a suit for possession as mortgagees on foot of their earlier mortgage, and obtained a

* Second Appeal No. 462 of 1900 from a decree of Syed Muhammad Ali, District Judge of Jaunpur, dated the 7th February 1900, reversing a decree of Babu Srish Chandar Bose, Subordinate Judge of Jaunpur, dated the 29th September 1899.

(1) (1801) 7 Ves., 174.
(2) (1858) 25 B., 575.
(3) (1873) L. R., 8 Ch., 870.
(4) (1893) I. L. R., 15 All., 219.
(5) (1894) I. L. R., 16 All., 398.
(6) (1896) I. L. R., 18 All., 354.

decree on the 4th of January, 1894, and on the 2nd March, 1894, got possession of the *sir* lands. The plaintiff brought a suit on foot of her mortgage impleading both Rajab Ali and the defendants, and on the 24th of June, 1895, obtained a decree for sale, which decree was made absolute on the 15th of February 1896. At the auction sale held in execution of her decree, the plaintiff purchased the property on the 20th of August, 1896, and obtained possession on the 25th of February, 1897. Upon this sale Rajab Ali became ex-proprietary tenant of the *sir* lands, and he, on the 15th of January 1898, relinquished his ex-proprietary rights in favour of the plaintiff. This, the defendants maintain, Rajab Ali had no right to do. The plaintiff instituted the suit out of which this appeal has arisen for possession of the *sir* lands, alleging that the defendants had ejected the sub-tenants from a portion of such lands, and had obtained possession of such portion, and that they had obstructed the plaintiff in realizing the rents of other portions of the *sir* lands. The main defence was that Rajab Ali's ex-proprietary right in respect of the *sir* land became vested in the defendants as usufructuary mortgagees, and that he was not competent to relinquish this right in favour of the plaintiff to the detriment of the defendants, and so the relinquishment was void as against the defendants.

The Subordinate Judge upheld this defence, and decided that Rajab Ali could not, to the prejudice of his mortgagees, the defendants, relinquish his ex-proprietary holding. He held that the plaintiff by her prior purchase acquired only the zamindari interest of Rajab Ali, and that the defendants were in possession of the *sir* lands, not as mortgagees of the proprietary right of Rajab Ali, which alone passed to the plaintiff, but as mortgagees of his ex-proprietary rights. He quotes the case of *Karamat Khan* v. *Samiuddin* (1) in support of his view. On appeal the District Judge reversed the decree of the lower Court, holding that, inasmuch as no lease was granted of his occupancy holding by Rajab Ali as an ex-proprietary tenant, there was nothing to prevent him from availing himself of the right to relinquish his holding if he chose to do so. "No authority," he says, "has been pointed out for the contention that the defendants respondents

(1) (1886) I. L. R., 8 All., 409.

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became mortgagees of the ex-proprietary rights of Rajab Ali by reason of the proprietary rights of Rajab Ali having been sold subsequent to the mortgage. The intention of Rajab Ali could never have been to mortgage his cultivatory rights as an ex-proprietary tenant. What Rajab Ali himself did not possess at the time of the mortgage to the defendants he could not transfer. It is therefore not sound to contend that the mortgage by Rajab Ali in favour of the defendants included the mortgage of his occupancy rights as an ex-proprietor as well as his proprietary rights." In another part of his judgment he says :—"It cannot for a moment be supposed that the defendants respondents acquired the same rights as Rajab Ali acquired as an ex-proprietor after his proprietary rights had been sold ; for such acquisition of occupancy rights was prohibited by section 9 of the Rent Act."

We are unable to agree in the view taken by the learned District Judge. The defendants were in possession of the *sir* land under and by virtue of their usufructuary mortgage. When Rajab Ali lost his proprietary rights in the *sir* his tenure was changed, no doubt, from that of a proprietary tenure to an ex-proprietary tenure. Some interest, however, in the *sir* lands still remained vested in him ; but he had already disposed of the usufruct of the land by the mortgages which he had executed in favour of the defendants. These mortgages, we think, attached to, and bound the estate of the mortgagor in its altered condition. Instead of the defendants continuing in possession as usufructuary mortgagees of land held under a proprietary tenure, their possession became that of mortgagees of an ex-proprietary tenure. In no way is the plaintiff, as it appears to us, prejudiced by this ; she will be entitled to payment of the rent just as she would have been entitled to receive it from Rajab Ali if the defendant's mortgage had not been in existence. The District Judge says, what Rajab Ali himself did not possess at the time of the mortgage to defendants, he could not transfer. He overlooks the fact that a mortgagee is entitled for the purposes of his security to all such interests as may be acquired either as accretions to or in place of the original interest which was conveyed to him ; for example, in the case of a mortgage or charge upon lease-holds, if a new lease be obtained by a mortgagor, either on a forfei-

ture of the original lease or by other means, the owner of the mortgage or charge will have the benefit of the new lease for the purpose of his security, and yet the mortgagor could not at the time of the mortgage have transferred the new lease to the mortgagee as it was not in existence—*Moody* v. *Mathews* (1), *Hughes* v. *Howard* (2), *Trumper* v. *Trumper* (3). It appears to us, therefore, clear that the ex-proprietary interest acquired by Rajab Ali in place of his proprietary interest in the *sir* land became subject to the defendants' mortgages.

Assuming this to be so, the next question is whether Rajab Ali was justified in relinquishing his ex-proprietary holding in favour of the plaintiff. In our opinion he was clearly not entitled to do so. It is a well-recognised principle of law that a man shall not derogate from his own grant. The effect of the relinquishment of his tenancy by Rajab Ali, if the relinquishment were valid, would be not merely to impair the security of the defendants, but to altogether destroy it. The principle to which we have referred is recognised in the case of *Badri Prasad* v. *Sheo Dhian* (4), in which case it was held that where an occupancy tenant grants a lease of land forming part of his occupancy holding for a term of years, he cannot, during the subsistence of such term, relinquish his holding to the zamindar so as to put an end to his lessee's rights under the lease. The principle applies to the case of a mortgage as well as to the case of a lease.

It only remains to consider whether section 9 of the Rent Act precludes the defendants from relying on the defence which has found favour with the lower appellate Court. It was laid down by a Full Bench of this Court in the case of *Khiali Ram* v. *Nathu Lal* (5), that the second paragraph of section 9 of Act No. XII of 1881 did not apply to a usufructuary mortgage. The learned District Judge evidently overlooked this authority. The present case is unlike the case of *Sukru* v. *Tafazzul Husain Khan* (6), in which an occupancy tenant gave a *simple mortgage* of his land, and the mortgagee brought a suit on his mortgage, and obtained a decree for sale under section

(1) (1801) Ves., 174.
(2) (1858) 25 B., 575.
(3) (1873) L. R., 8 Ch., 870.
(4) (1896) I. L. R., 18 All., 354.
(5) (1893) I. L. R., 15 All., 219.
(6) (1894) I. L. R., 16 All., 398.

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88 of Act No. IV of 1882, and upon sale under the decree purchased the land himself, and obtained possession of it. This was clearly obnoxious to the provisions of section 9 of Act No. XII of 1881, and not binding on the landlord.

For the foregoing reasons we allow the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Subordinate Judge dismissing the plaintiff's claim with costs. The appellants will have their costs in all Courts.

Appeal decreed.

1902
July 5.

Before Mr. Justice Banerji and Mr. Justice Aikman.

ALI AHMAD (JUDGMENT-DEBTOR) *v.* NAZIRAN BIBI (DECREE-HOLDER).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 86 *and* 87—*Application for order absolute under section* 87—*Execution of decree—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), schedule ii, articles* 178 *and* 179.

An application for an order absolute under section 87 of the Transfer of Property Act, 1882, is an application in execution of the decree under section 86 of the Act, and is governed as to limitation by article 178 of the second schedule to the Indian Limitation Act, 1877, the time from which limitation begins to run being the date fixed by the decree under section 86 for payment of the mortgage money.

Kedar Nath v. *Lalji Sahai* (1), *Oudh Behari Lal* v. *Nageshar Lal* (2), *Chunni Lal* v. *Harnam Das* (3), *Parmeshri Lal* v. *Mohan Lal* (4), *Bhagwan Ramji Marwadi* v. *Ganu* (5), *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (6), *Chhedi* v. *Lalu* (7), *Ram Sarup* v. *Ghaurani* (8) and *Ranbir Singh* v. *Drigpal Singh* (9) referred to.

THE facts of this case are as follows:—

On the 27th of November, 1897, Naziran Bibi and Bismillah Bibi obtained a decree for foreclosure against Ali Ahmad conditioned on their paying off certain incumbrances. The time limited for redemption under this decree expired on the 27th May, 1898. On the 23rd of May 1901 Naziran Bibi applied to the Court for an order absolute for foreclosure in respect of her interest in the decree, alleging that the other decree-holder had

*First Appeal No. 130 of 1901 from an order of Munshi Mata Prasad, Officiating District Judge of Ghazipur, dated the 16th of September, 1901.

(1) (1889) I. L. R., 12 All., 61.
(2) (1890) I. L. R., 13 All., 278.
(3) (1898) I. L. R., 20 All., 302.
(4) (1898) I. L. R., 20 All., 357.
(5) (1899) I. L. R., 23 Bom., 644.
(6) (1894) I. L. R., 17 All., 39.
(7) Weekly Notes, 1902, p. 60.
(8) (1899) I. L. R., 21 All., 453.
(9) (1893) I. L. R., 16 All., 23.

refused to take any steps towards the execution of the decree, and that she (Naziran Bibi) alone had paid off the incumbrances mentioned in the decree. This application was resisted on two grounds—first, that it was barred by limitation, and secondly, that Naziran Bibi alone was not competent to apply. The Court of first instance (Subordinate Judge of Ghazipur) overruled the plea of limitation, and, at the suggestion of the applicant's pleader made an order absolute for foreclosure in respect of Naziran Bibi's share alone. The judgment-debtor appealed, and the lower appellate Court (Officiating District Judge of Ghazipur), while agreeing with the Court of first instance on the question of limitation, set aside the order on other grounds and remanded the case under section 562 of the Code of Civil Procedure. From this order the judgment-debtor appealed to the High Court, again raising the plea that the application made by Naziran Bibi was time-barred.

Mr. *J. Simeon*, for the appellant.

Mr. *Muhammad Raoof* and Munshi *Haribans Sahai*, for the respondent.

BANERJI, J. (AIKMAN, J., concurring).—The respondent, Musammat Naziran Bibi, and one Bismillah Bibi, obtained a decree for foreclosure against the appellant under section 86 of the Transfer of Property Act, 1882, on the 27th of November, 1897. For the payment of the mortgage money the decree allowed a period of six months, which expired on the 27th of May, 1898. On the 23rd of May, 1901, Musammat Naziran Bibi applied under section 87 of the Act for an order absolute for foreclosure. That application was resisted on two grounds —first, that it was barred by limitation; and secondly, that Naziran Bibi alone was not competent to make it. The plea of limitation has been overruled by both the Courts below. With reference to the other plea, the lower appellate Court has reversed the order of the Court of first instance, and remanded the case to that Court under section 562 of the Code of Civil Procedure. From this order of remand the present appeal has been brought.

The plea of limitation has been repeated before us, and it is urged that under art. 179 of the second schedule of the Indian

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Limitation Act, limitation should be computed from the date of the decree under section 86, and not from the date on which, according to that decree, the mortgage money was payable.

According to the rulings of this Court an application for an order under section 87 of the Transfer of Property Act is an application in execution. In *Kedar Nath* v. *Lalji Sahai* (1), it was held by a Full Bench that the order mentioned in that section is an order in execution of the substantive foreclosure decree. It necessarily follows that an application for such an order is an application in execution. This view was upheld in the later Full Bench case of *Oudh Behari Lal* v. *Nageshar Lal* (2). In that case it was held that an application for an order absolute for sale under section 89 is a proceeding in execution, and subject to the rules of procedure governing such matters. The ruling in *Kedar Nath* v. *Lalji Sahai* was approved of, and although, as stated above, the case was one to which section 89 applied, reference was made to section 87, and the same rule was held to apply to applications under both the sections. Following the principle of these rulings and of the decision in *Chunni Lal* v. *Harnam Das* (3), it was held in *Parmeshri Lal* v. *Mohan Lal* (4), that an application for an order under section 87 of Act No. IV of 1882, is an application in execution to which the provisions of the Limitation Act apply. With this view we entirely concur.

The next question which we have to consider is, what is the period of limitation governing an application under section 87, and what is the date from which limitation should be computed? It is contended on behalf of the appellant that the limitation applicable is that prescribed by art. 179 of the second schedule, and that it should be computed under the first paragraph of the 3rd column of that article, from the date of the decree under section 86. In support of this contention the rulings in *Chunni Lal* v. *Harnam Das* (3) and *Parmeshri Lal* v. *Mohan Lal* (4), and the dictum of Parsons, A. C. J. and Ranade, J., in *Bhagwan Ramji Marwadi* v. *Ganu* (5) have been referred to. It is conceded that the only paragraph

(1) (1889) I. L. R., 12 All., 61.
(2) (1890) I. L. R., 13 All., 278.
(3) (1898) I. L. R., 20 All., 302.
(4) (1898) I. L. R., 20 All., 357.
(5) (1899) I. L. R., 23 Bom., 644.

of art. 179, which is, if at all, applicable to the present case, is the first, the other paragraphs having no application. Now, there can be no doubt that the decree or order referred to in that paragraph must be a decree or order which, on the date of it, is capable of execution, and that the *terminus a quo* under that paragraph cannot be a date on which the decree or order is not executable. This was held in *Muhammad Suleman Khan* v. *Muhammad Yar Khan* (1) and in the recent case of *Chhedi* v. *Lalu* (2). A decree for foreclosure under section 86 of the Transfer of Property Act, which, in compliance with the provisions of that section, fixes a date for payment of the mortgage money, cannot be enforced before the expiry of that date. This is clear from the terms of section 87. Under that section the plaintiff may apply for an order absolute for foreclosure if payment is not made as directed by the decree under section 86. An application under section 87 cannot, therefore, be made on the date of the decree under section 86, and from the very nature of things limitation cannot run against the applicant from that date. Consequently the first paragraph in the third column of art. 179 cannot apply to an application under section 87. It is true that in the cases mentioned above art. 179 was referred to, but the real question was that of the applicability of the second schedule of the Limitation Act. In the two cases decided by this Court, the date fixed in the decree for the payment of the mortgage money had long expired before the date of the application under consideration. It was not, therefore, necessary to decide in those cases what was the *terminus a quo* for purposes of limitation. One of us was a party to the ruling in *Chunni Lal* v. *Harnam Das* (3), and is in a position to state that no question arose in that case as to the date from which limitation should be computed. In *Parmeshri Lal* v. *Mohan Lal* (4), the learned Judge, Burkitt, J., after holding that an application under section 87 of the Transfer of Property Act was an application in execution to which the provisions of art. 179 of sch. ii of the Limitation Act applied, observed as follows:—"It is admitted that a period of more than three years has elapsed between the date of the decree and the date of the application.

(1) (1894) I. L. R., 17 All., 39.
(2) Weekly Notes, 1902, p. 60.
(3) (1898) I. L. R., 20 All., 302.
(4) (1898) I. L. R., 20 All., 357.

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The application was therefore time-barred when made." The learned vakil for the appellant relies upon these observations as supporting his contention that limitation should be computed from the date of the decree. We have, however, the authority of our brother Burkitt for stating that he did not decide, and did not intend to decide, that the starting-point for computing limitation is the date of the decree under section 86, as the question did not arise for consideration. In the Bombay case to which we have referred the point was not decided. For the reasons we have stated above, we are unable to hold that limitation runs, in a case like this, from the date of the decree.

As art. 179 of the second schedule of the Limitation Act does not govern the application of the respondent, we have to determine what other article is applicable. In our opinion the application in question is governed by art. 178, that being the article which prescribes the limitation for an application for which provision is not made in any other article in the schedule. The application being one in execution, it cannot be said to be an application to which the Code of Civil Procedure has no reference. It is no doubt an application under the specific provisions of section 87 of the Transfer of Property Act; but it is to the Code of Civil Procedure to which we must look for the procedure by which it is governed. The learned vakil for the appellant referred us to the case of *Ranbir Singh* v. *Drigpal Singh* (1), in which art. 178 was held to be inapplicable to an application under the Transfer of Property Act. That was a case decided by a single Judge. In the later case of *Ram Sarup* v. *Ghaurani* (2), a Division Bench of two Judges, one of whom, it may be observed, was the learned Judge who had decided the case in 16 Allahabad, held art. 178 to be applicable to an application for a decree under section 90 of the Transfer of Property Act. We see no reason for holding the article to be inapplicable to an application like the one before us. And as the said application was made within three years from the date on which the right to apply accrued, that is, from the date fixed in the decree under section 86 for payment of the mortgage money, the application was not time-barred.

(1) (1893) I. L. R., 16 All., 23. (2) (1899) I. L. R., 21 All., 453.

In our opinion the third ground of appeal has no force, and the order of remand appealed against was a proper order. We dismiss the appeal with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

GHANSHAM SINGH (PLAINTIFF) *v.* BADIYA LAL AND ANOTHER (DEFENDANTS).*

Hindu Law—Hindu widow—Alienation for legal necessity—Duty of person advancing money to Hindu widow—Burden of proof.

If a mortgagee advances money to a Hindu widow holding a widow's estate in the property mortgaged after making proper inquiry for the purpose of ascertaining that the money is required for legal necessity, it is not incumbent on him to see that the money he advances is applied to meet such legal necessity, nor is he bound to ascertain that every pice of the money so advanced is actually required for a legal necessity. *Amar Nath Sah* v. *Achan Kunwar* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* and Munshi *Gokul Prasad* (for whom Babu *Sital Prasad Ghosh*), for the appellant.

Pandit *Sundar Lal*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This suit was brought by the plaintiff to have it declared that two mortgages, one made by the widow of Charan Singh and the other by his mother, were made without legal necessity and were void, and for possession and mesne profits. Charan Singh was the owner of the property in suit. After his death his mother Jai Kunwar was recorded as owner. On the 8th of January, 1877, the mother and the widow together hypothecated a share in the village Nawanagir to Madan Gopal to secure a sum of Rs. 300. Madan Gopal sued upon his mortgage and obtained a decree, and at the auction sale Ishri Prasad, father of the defendants, purchased the property on the 23rd of August, 1892. Again, on the 7th of February, 1881, the same parties mortgaged a share in another village called Kajrauth to one Murli Dhar. On his death the name of

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* Second Appeal No. 989 of 1900 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 13th of August, 1900, reversing a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 29th September, 1899.

(1) (1892) I. L. R., 14 All., 420.

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Ishri Prasad was entered in respect of the mortgaged property. The mother of Charan Singh died many years ago. His widow Dan Kunwar died on the 17th of November, 1896. After her death the present suit was instituted by the present plaintiff claiming to be the representative of Charan Singh.

The defence to the suit was that the mortgage was made for legal necessity. The first Court held that the first mortgage was not made for any legal necessity, and in respect of the property comprised in that mortgage decreed the plaintiff's claim. As regards the second mortgage, the first Court held that it was made for legal necessity to some extent, that is, that money to the amount of Rs. 282 was required to meet a legal necessity; that as regards the balance, there was no legal necessity for the loan, and accordingly gave a decree to the plaintiff for possession of the property comprised in the second mortgage subject to the payment of Rs. 282. Upon appeal the District Judge held on the evidence that both the mortgages were made to meet legal necessities. In regard to the first mortgage, the money was required to meet Government revenue and partition expenses, and in the case of the second mortgage the money was required to meet partition expenses, Government revenue, moneys expended on a well, and in the purchase of seed. Accordingly so finding he has dismissed the plaintiff's claim with costs.

It is now contended before us by the learned pleader for the appellant that the District Judge ought to have found how much of the moneys advanced on foot of each mortgage were actually required to meet legal necessities. We are unable to follow him in this contention. If a mortgagee advances money after making proper inquiry for the purpose of ascertaining that the money is required for legal necessity, it is not incumbent on him to see that the money which he advances is applied to meet such legal necessity, nor is he, in our opinion, bound to ascertain that every pice of the money so advanced is actually required for a legal necessity. In the case of *Amar Nath Sah* v. *Achan Kunwar* (1) their Lordships of the Privy Council observed that in order to sustain an alienation of property by a Hindu widow having a widow's estate, it must be

(1) (1892) I. L. R., 14 All., 420.

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shown that there was either a legal necessity for the alienation, or at least the grantee was led, on reasonable grounds, to believe that there was. There is nothing in their Lordships' judgment to suggest that there is any obligation on the lender in such a case to satisfy himself that the entire money which he is advancing is actually required for a legal necessity, provided he acts *bonâ fide* in the matter, and reasonably believes that the money is required to meet a legal necessity. This being our view the appeal fails and is dismissed with costs.

Appeal dismissed.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

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PARMANAND (DEFENDANT) *v.* DAULAT RAM AND OTHERS (PLAINTIFFS).*

Act No. IV of 1882 *(Transfer of Property Act), sections* 67, 85, 99 *—Mortgage—Sale under a decree of equity of redemption—Rights of purchaser, the decree having become final.*

On the 22nd of March, 1881, one Nathu Ram mortgaged certain property with possession. On the 9th of May, 1881, the mortgagees leased the mortgaged property to Nathu Ram, who, as security for the rent due from him, further pledged his equity of redemption. The original mortgagees died. The rent due under the lease fell into arrears; and the successor in title of the mortgagees instituted a suit against the mortgagor to recover the amount due to him for arrears of rent by sale of the equity of redemption of the property. On the 27th of November, 1889, a decree for sale was passed, and on the 31st of March, 1890, an appeal against the decree for sale was rejected. The property was accordingly sold by virtue of the decree for sale, and was purchased by the successor in title of the mortgagees on the 20th of April, 1891. The sons of Nathu Ram thereupon brought a suit, claiming proprietary possession of the property on the ground that the sale of the equity of redemption was illegal and void, and conveyed nothing to the purchaser.

Held that the sale having been the outcome of a suit under section 67 of the Transfer of Property Act, 1882, did not offend against section 99 of the Act, and that although, according to law as laid down by the High Court, the sale of an equity of redemption was not contemplated by the Transfer of Property Act, yet, inasmuch as the sale had taken place under a decree which had become final, it could not at that time be upset. *Matadin Kasodhan* v. *Kazim Husain* (1) and *Tara Chand* v. *Imdad Husain* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

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* First Appeal No. 267 of 1901 from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 30th of June 1900.

(1) (1891) I. L. R., 13 All., 432. (2) (1896) I. L. R., 18 All., 325.

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PARMANAND v. DAULAT RAM.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the appellant.

Pandit *Baldeo Ram*, for the respondents.

STANLEY, C.J. and BANERJI, J.—The plaintiffs, respondents, who are the sons of one Nathu Ram, brought this suit for proprietary possession of 7½ shares out of 10 biswas in mauza Nagla Sada under the following circumstances:—On the 22nd of March, 1881, Nathu Ram mortgaged with possession 7½ shares to the predecessors in title of Parmanand, the defendant appellant, to recover a sum of Rs. 4,600 and interest thereon, and on the 9th of May, 1881, the same parties granted a lease of the same property to Nathu Ram. Nathu Ram, as security for the rent payable under the lease, mortgaged the property to the lessors. The predecessors in title of the defendant appellant died; rent fell into arrears under the lease, and the defendant appellant instituted a suit against Nathu Ram to recover the amount due to him for arrears of rent by sale of the equity of redemption of the property. On the 27th of November, 1889, a decree for sale was passed, and on the 31st of March, 1890, an appeal against the decree for sale was rejected. The property was accordingly sold by virtue of the decree for sale, and was purchased by Parmanand on the 20th of April, 1891. The plaintiffs, who are the sons of Nathu Ram, thereupon brought the present suit. Their case is, that the sale made under the decree of the 27th of November, 1889, was illegal and void, and they claim proprietary possession of the property in dispute. They did not offer to redeem the mortgages of the 22nd of March, 1881 and the 9th of May, 1881.

The main defence of the defendant was that the plaintiff was not competent to sue for possession of the property, and that of the property only 1½ shares were ancestral property, and that the remaining six shares were the self-acquired property of Nathu Ram. The Subordinate Judge held in favour of the plaintiff's contention, that the sale was invalid for two reasons—first, that it was a sale of the equity of redemption and not of the mortgaged property; and secondly, that it was contrary to the provisions of section 99 of the Transfer of Property Act, and so was invalid. He held that the sale to the defendant passed

nothing to him, and that the plaintiffs could sue for possession of their shares. In the course of his judgment the learned Subordinate Judge says:—"I admit that the plaintiffs cannot sue for actual possession so long as the usufructuary possession subsists. The defendant as usufructuary mortgagee is entitled to continue in possession as such mortgagee until that mortgage is redeemed. The plaintiffs cannot, therefore, obtain a decree for actual possession; but there is no reason why they should not obtain a decree for proprietary possession subject to the defendant's mortgage." He held in accordance with the contention of the defendant that of the 7½ shares, only 1½ shares were ancestral property of the family, and such being the case, he gave the plaintiffs a decree for possession to the extent of three-fourths of 1½ shares.

From this decree there has been an appeal, and also a cross-appeal No. 8 of 1901. In the cross-appeal the plaintiffs claim, instead of the three-fourths of 1½ shares, the entire 7½ shares. The grounds of appeal in the present case are, first, that the sale was not void under section 99 of the Transfer of Property Act; secondly, that the sale was binding on the parties to the decree, and passed a good title to the purchaser; thirdly, that the sale was a sale of property, and even if it were a sale of the equity of redemption only, it was not void in law; and fourthly, that there was no proof that the appellant had notice of the existence of any interest of the plaintiff in the property, and that the sale in execution of the decree was not in contravention of section 85 of the Transfer of Property Act.

As regards the first ground of appeal, namely, that the sale was not in contravention of the provisions of section 99 of the Transfer of Property Act, it appears to us that the contention advanced on behalf of the appellant must prevail. Section 99 provides that a mortgagee who, in execution of a decree for the satisfaction of any claim, attaches the mortgaged property, shall not be entitled to bring such property to sale otherwise than by instituting a suit under section 67. In this case the appellant did institute a suit under the provisions of section 67 of the Transfer of Property Act for sale of the property mortgaged to him by the deed of the 9th of May, 1881, and obtained a decree in accordance with section 88 of the same Act. We, therefore,

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think that there was no violation of the provisions of section 99 in the course which the appellant adopted. The cases which were relied upon by the learned vakil for the respondent in support of his contention are all cases in which money decrees only had been obtained, and not decrees as in the present case under section 67 of the Transfer of Property Act.

The next ground of appeal with which we shall deal is, that the sale was a sale of the property, and that even if it were a sale of the equity of redemption only, it was not void in law. According to the ruling of a majority of a Full Bench of this Court by which we are bound, whatever may be our opinion as to the correctness of it, an equity of redemption cannot be sold. This was the case of *Matadin Kasodhan* v. *Kazim Husain* (1). In view of this decision it appears to us that the sale which was held in this case was not a valid sale. However, the Court in the case before us entertained the suit for sale of the equity of redemption, passed a decree for sale of the equity of redemption, and sold the equity of redemption. There was no appeal against the decree, and the decree for sale must now be treated as valid and binding on the parties to the suit. This was so decided in the case of *Tara Chand* v. *Imdad Husain* (2). The sale was, therefore, binding on Nathu Ram, the father of the plaintiffs respondents. Can the sons now impeach it? There is no suggestion that the debt in respect of which the mortgage was granted was tainted with immorality. Nathu Ram himself could have sold the property, including the interests of his sons in it, to the appellant, and the plaintiffs, respondents, could not have impeached the transaction. The Court has only done what Nathu Ram himself could have done; and under such circumstances it appears to us that it would be most inequitable now to allow the plaintiffs, respondents, to impugn the transaction. In disposing of this ground of appeal we have dealt with the second as well as the third ground of appeal.

It only remains to consider the last ground of appeal which has been discussed before us, *viz.* the allegation that the sale of the property was not in contravention of the provisions of section 85 of the Transfer of Property Act. This question was not

(1) (1891) I. L. R., 18 All., 432. (2) (1896) I. L. R., 18 All., 325.

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determined by the lower Court, but it appears that the defendant appellant was not proved to have had any notice of the interest of the plaintiffs, respondents, in the property. On the contrary, the evidence, so far as it goes, goes to show that some inquiry was made by or on behalf of the appellant as to interested parties, and that he was unable to ascertain that there was any one interested in the property at the time of suit other than Nathu Ram. For these reasons we are of opinion that the appellant has established his case, and we accordingly allow the appeal, set aside the decree of the Court below, and dismiss the plaintiffs' suit with costs in both Courts.

Appeal decreed.

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July 10.

Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Banerji.

HINGU LAL (PLAINTIFF) *v.* BALDEO RAM AND OTHERS (DEFENDANTS).*

Civil Procedure Code, sections 43, 44—*Cause of action—Misjoinder of causes of action—Omission to claim all the reliefs to which plaintiff is entitled to on the cause of action.*

One *R D* brought a suit against two persons *M* and *G*, claiming to recover certain cash and ornaments belonging to one Sahai, deceased. To that suit *B R* and *B*, who had previously brought a suit for certain immovable property belonging to the same estate, applied to be, and were, added as defendants. After this *H L*, the son of *R D*, brought a suit claiming possession of a house which originally belonged to Sahai, and which was alleged to be then in the possession of *B R* and *B*.

Held that the provisions of section 43 of the Code of Civil Procedure did not apply to these facts so as to bar the suit brought by *H L*.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor* and Pandit *Madan Mohan Malaviya* (for whom Pandit *Tej Bahadur Sapru*), for the appellant.

Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the respondents.

STANLEY, C.J. and BANERJI, J.—This is an appeal against the decree of the District Judge of Mirzapur, dismissing the suit of the plaintiff, appellant, on the ground that it is barred by the

* Second Appeal No. 1024 of 1900, from a decree of Nawab Muhammad Ishaq Khan, District Judge of Mirzapur, dated the 2nd of November, 1900, reversing a decree of Munshi Anant Prasad, Subordinate Judge of Mirzapur, dated the 27th of August, 1900.

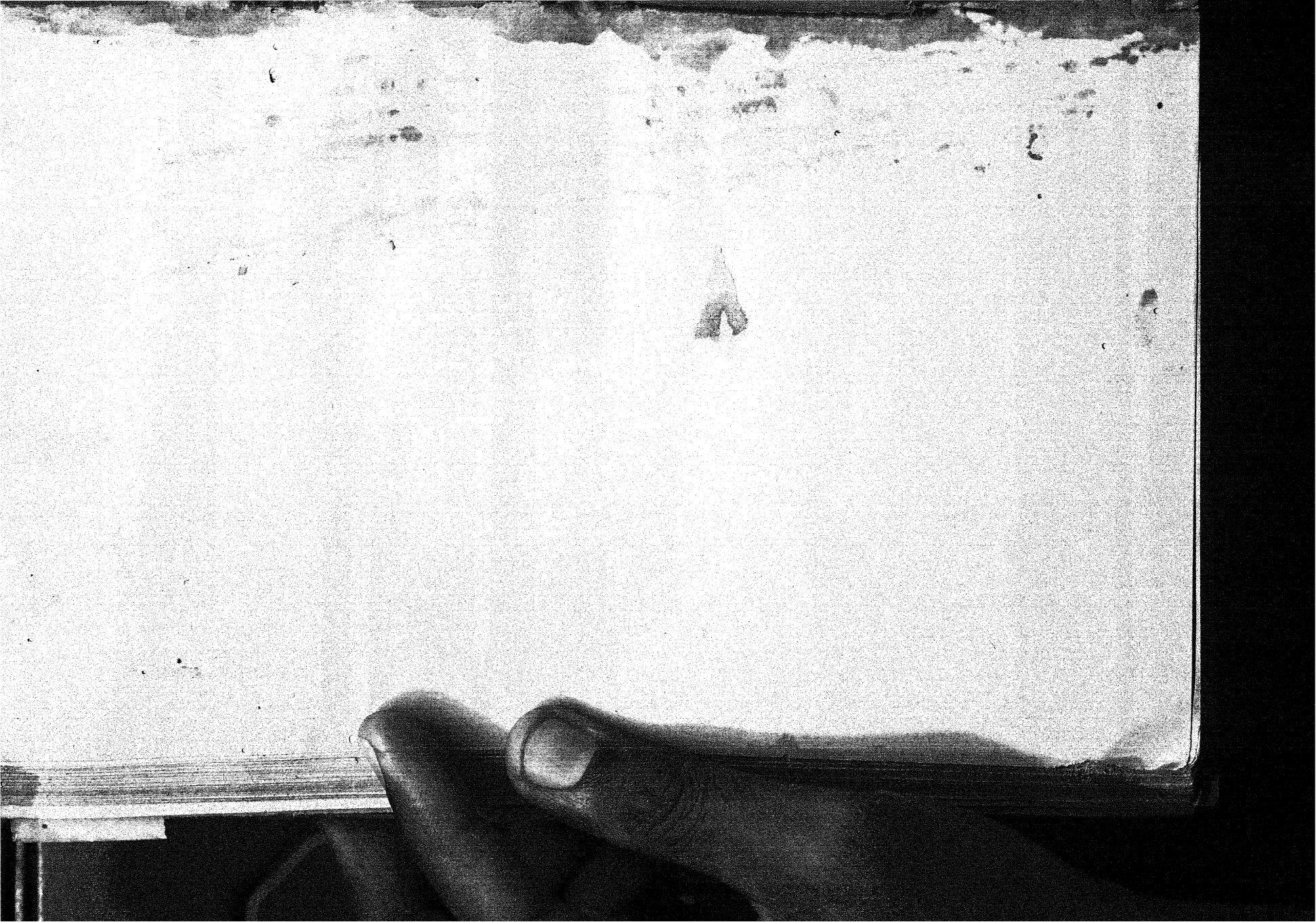
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provisions of section 43 of the Code of Civil Procedure. The property claimed is a house which originally belonged to one Sahai. After Sahai's death it was in the possession of his widow, Musammat Kabutra, who died in 1892. The defendants are the brother, and the sons of the brother of Musammat Kabutra, and they are alleged to be in possession of the house. The plaintiff claims to be entitled to the house as next heir of Sahai after his widow's death. The suit was resisted upon the ground, amongst others, that it offended against the provisions of the 43rd section of the Code. The Court of first instance overruled this plea and decreed the plaintiff's claim. The defendants appealed, and in their appeal they reiterated the plea based on the provisions of section 43. The lower appellate Court allowed the plea and dismissed the suit. The plaintiff appeals to this Court. It appears that the plaintiff's father Ram Das brought a suit against two persons, Mathura and Gopal, claiming to recover certain cash and ornaments alleged to have belonged to Sahai. The defendants, Baldeo Ram and Bawan, appear to have brought a suit for certain immovable property before the institution of Ram Das' suit, and they applied to the Court, under section 32 of the Code of Civil Procedure, to be added as defendants to the suit brought by Ram Das. Their application was granted, and they were made defendants. The learned Judge of the lower appellate Court has held that the plaintiff's father Ram Das was bound to amend his plaint in the suit brought by him, and to add a prayer for recovery of possession of the house now in suit as soon as Baldeo Ram and Bawan were made parties to it, and that his omission to do so precludes the plaintiff from bringing the present suit. We are unable to agree with this view. As regards Ganeshi, defendant, who was not a party to the former suit, section 43 certainly has no application. As regards the other defendants also, we think that that section cannot operate as a bar. The learned Judge says, that when Baldeo Ram and Bawan were added as defendants to Ram Das' suit, Ram Das was bound, under the provisions of section 33 of the Code of Civil Procedure, to amend his plaint, and "to bring the whole of his claim against all the four defendants for adjudication before the Court." The learned Judge overlooks the fact that the plaintiff in that

suit had no claim in respect of the house against the original defendants. Section 33 does not certainly contemplate that upon the addition of defendants to a suit a cause of action different from that upon which the suit was founded, which may have accrued to the plaintiff against the added defendants, should be added to the claim. All that section 33 requires is, that when a defendant is added the plaint should be amended in such manner as may be necessary, and an amended copy of the summons served on the defendants. The amendment there referred to is such amendment as is necessitated by the addition of a defendant, and not such an amendment as would add to or alter the nature of the suit as originally brought. Further, the learned Judge seems to have lost sight of the provisions of section 44 of the Code of Civil Procedure, which forbids the joinder with a suit for the recovery of immovable property, or to obtain a declaration of title to such property of any claim other than the claims specified in the section. Now the suit brought by Ram Das was a suit to recover movable property, and he could not have added to such a suit a claim for possession of immovable property without violating the provisions of section 44. We think that the learned Judge was clearly wrong in dismissing the suit. We therefore allow the appeal, set aside the decree of the Court below, and remand the case under section 562 of the Code of Civil Procedure to that Court for trial on the merits. The appellant will have the costs of this appeal. Other costs will follow the event.

Appeal decreed and cause remanded.



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——— SECTIONS 96, *et seqq.*, *See* Act No. XLV of 1860, section 147 298

——— SECTION 147—*Riot—Private defence of property—Act No. XLV of* 1860, *Indian Penal Code, sections* 96 *et seqq.—Deliberate aggression by party entitled to possession.*] Party *A* sowed a crop in a field to the possession of which apparently they were entitled. Party *B* claiming the field and the crop as theirs, entered upon the land and began to cut the crop. Party *A*, having watched party *B* enter upon the land, took counsel together and then proceeded to attack party *B*, and a fight ensued in which grievous hurt was caused. *Held*, that it was not open to party *A* to plead that they were acting in the exercise of their right of private defenceof property. *Queen-Empress* v. *Prag Dat*, I. L. R., 20 All., 459, followed. *Queen-Empress* v. *Narsang Pathabhai*, I. L. R., 14 Bom., 441, distinguished. *Pachkauri* v. *Queen-Empress*, I. L. R., 24 Calc., 686, not followed.

King-Emperor *v.* Kaliji, I. L. R., 24 All. 143

——— SECTION 147 — *Riot — Act No. XLV of* 1860, *sections* 96 *et seqq.—Right of private defence.*] Of two parties, each of which claimed title to certain trees, one party went to cut down the trees, and went armed with *lathis*, apparently with the intention of resisting anticipated opposition on the part of the other claimants. The other party attempted to stop the cutting down of the trees, and a fight ensued, in the course of which several people were injured. *Held*, that the first party were guilty of rioting, and, whatever their title to the trees was, could not claim that they had acted in the exercise of the right of private defence.

Emperor *v.* Kadhu Singh, I. L. R., 24 All. 298

——— SECTION 406 — *Criminal breach of trust—Charge—Criminal Procedure Code, sections* 222, 234.] Where an accused person is charged with having misappropriated or committed criminal breach of trust in respect of an aggregate sum of money, the whole sum being alleged to have been wrongfully dealt with by the accused within a period not exceeding one year, the mere fact that the items composing the such aggregate sum are specified and may be more than three in number will not render the charge obnoxious to the prohibition implied by section 234 of the Code of Criminal Procedure. *Subrahmania Ayyar* v. *King-Emperor*, I. L. R., 25 Mad., 61, S.C. 5 C.W.N., 866.

Emperor *v.* Gulzari Lal, I. L. R., 24 All. 254

——— SECTIONS 426, 298, 504—*Mischief—Wilful pollution of food served at a caste dinner.*] Certain Hindus present at a caste dinner had sat down to partake of the food which had been served to them, when certain other members of the caste came, and, after telling those who were seated to move to

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another place, which they refused to do, threw down a shoe amongst the men who were seated. The persons who threw the shoe were convicted of mischief, on the ground as their action had polluted the food, and had, from a Hindu religious point of view, rendered it unfit to be eaten. On reference by the Sessions Judge it was *held* that this conviction was wrong; neither could the accused be convicted under section 298 or under section 504 of the Indian Penal Code on the facts found.

King-Emperor *v.* Moti Lal, I. L. R., 24 All. 155

ACTS—1870—VII (COURT FEES ACT), SECTION 7, SUB-SECTION V*(b)*, *See* Pre-emption 218

————1872—I (INDIAN EVIDENCE ACT), SECTION 32, CLAUSES (5) AND (6)—*Title—Evidence and proof of title—Effect of arrangement made by Settlement Officer between the widow in possession and the ancestors of the plaintiff—Recognition of relationship and heirship—Evidence of pedigree—Statements* post litem—*Estoppel.*] The plaintiffs claimed certain lands on the death, in 1892, of the widow of the last male owner as his collateral heirs. The last owner was, they alleged, descended in the same degree from a common ancestor as the persons of whom the plaintiffs were themselves descendants in the direct line. These persons had made a similar claim through the common ancestor in 1847, when the settlement of the estate with the widow was being made, alleging themselves to be her husband's reversionary heirs (the widow being then in possession of the lands in dispute). On that occasion (it being uncertain whether she had an absolute or only a life estate in the property, though she claimed to be the absolute owner) she was asked by the Settlememt Officer who would be her heirs on her death. Her reply was:—"If the claimants undertake to pay the debt which is due by me on account of revenue, or which may hereafter be due by me, and if they are obedient to me and I am thoroughly satisfied with them, they will be owners of my estate after my death; but so long as I am alive I have every sort of power in respect of my estate;" and the estate was settled with her, the claimants accepting her conditions. In the record-of-rights showing the shares in the estate as prepared under Regulation IX of 1833 at the time of settlement the widow stated:—"As to the appointment of lambardar the claimants who are own brothers will become the owners of this estate in equal shares provided they pay the present and future debts and remain obedient to me, and one of them whom the Collector will think fit will be appointed lambardar." At a further settlement made in 1866 the widow stated:—"I have no heir to succeed me after my death, therefore I cannot propose anything in regard to the office of lambardar."

Held by the Judicial Committee that the statements made in 1847 amounted to an admission by the widow of relationship and recognition of the plaintiff's ancestors as her successors, a recognition on her part both that her husband's heirs were entitled to succeed her, and also that she was not prepared to contest their claim to be such heirs. The statements were unintelligible on any other footing, and unless the claimants were the heirs they had no interest in the proceedings. Neither their acceptance of her conditions, nor her subsequent statement that she had no heirs, detracted from this effect of the proceedings of 1847; the latter statement was strictly accurate if (as their Lordships found was the fact) she had only a Hindu widow's estate in the property.

The principal oral evidence consisted of statements made by the plaintiffs as to their descent, the information as to which they had received from their ancestors. Objection was taken that such

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of these statements as were made since 1847 were inadmissible in evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872) as being *post litem*. The Judicial Committee held that they were admissible, the heirship of the then claimants not being really in dispute at that time.

The widow had in 1862 made an alienation of the property to the defendants and it was objected to the plaintiffs' claim that they were estopped by what took place in 1847 from disputing her power of alienation as absolute owner of the property.

Held by the Judicial Committee that there was no evidence of any representation on which to found an estoppel; and even assuming that the arrangement made by the Settlement Officer amounted to a contract between the then claimants and the widow, such contract was not binding on the plaintiffs. The then claimants were only expectant heirs with a *spes successionis*. The plaintiffs claimed in their own right as heirs of the last male owner when the succession opened, and it could not be held that a person so claiming was bound by a contract made by every person through whom he traced his descent.

On the whole case the Judicial Committee held (reversing the decision of the High Court) that the plaintiffs had made out the title they set up.

Bahadur Singh *v.* Mohar Singh, I. L. R., 24 All. ... 94

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 44—*Res judicata—Evidence—Competence of party against whom a former judgment is set up as constituting res judicata to show that such judgment was obtained by fraud or collusion—Custom—Saraogis—Alleged custom of exclusion of daughters from inheritance to their fathers set up, but not proved.*] When a subsisting judgment, order or decree, which is relevant under section 40, 41 or 42 of the Indian Evidence Act, 1872, is set up by one party to a suit as a bar to the claim of the other party, it is not necessary for the party against whom such judgment, order or decree is set up to bring a separate suit to have the same set aside, but it is open to such party, in the same suit in which such judgment, order or decree is sought to be used against him, to show, if such be the case, that the judgment, order or decree relied upon by the other side was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Nistarini Dassi* v. *Nundo Lall Bose*, I. L. R., 26 Calc., 891; *Rajib Panda* v. *Lakhan Sendh Mahapatra*, I. L. R., 27 Calc., 11, and *Bansi Lal* v. *Ramji Lal*, I. L. R., 20 All., 370, referred to.

Semble that no custom exists in the North-Western Provinces of India amongst the members of the Saraogi community by reason of which females are excluded from inheriting the property of their fathers.

Bansi Lal *v.* Dhapo, I. L. R., 24 All. 242

——————IX (INDIAN CONTRACT ACT), SECTIONS 134 AND 137—*Principal and surety—Creditor allowing remedy against principal debtor to become barred by limitation—Discharge of surety.*] "Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him" as these words are used in section 137 of the Indian Contract Act, 1872, indicate a forbearance for a more or less limited period to exercise a subsisting right. The section does not cover such forbearance as results in the remedy of the creditor against the principal debtor becoming barred by limitation.

Hence where a judgment-creditor allowed his judgment-debtor to enter into an agreement for the satisfaction of his decree by

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instalments, certain persons becoming sureties for the due payment of such instalments, and, the judgment-debtor having made default in payment of the instalments, delayed taking out execution of the decree until execution had become time-barred, it was *held* that the creditor had forfeited his remedy against the sureties also. *Hazari Lal* v. *Chunni Lal*, I. L. R., 8 All., 259 and *Radha* v. *Kinlock*, I. L. R., 11 All., 310, followed. *Hajarimal* v. *Krishnarav*, I. L. R., 5 Bom., 647, dissented from.

Ranjit Singh *v.* Naubat, I. L. R., 24 All. 504

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 176—*Pawnor and Pawnee—Suit to recover balance of debt after sale of articles pawned—Limitation—Act No. XV of* 1877 *(Indian Limitation Act), Schedule II—Article* 57.] *Held* that the limitation applicable to a suit brought by a pawnee to recover the balance of his debt after accounting for the proceeds of the sale of the articles pledged is that prescribed by Article 57 of the second schedule to the Indian Limitation Act, 1877, namely, three years, and the *terminus quo* the date of the loan. *Madan Mohan Lal* v. *Kanhai Lal*, I. L. R., 17 All., 284, and *Ram Chandra* v. *Antaji*, Bom., P. J., 1886, p. 161, referred to.

Saiyid Ali Khan *v.* Debi Prasad, I. L. R., 24 All. ... 251

———1873—XIX (N.-W. P. LAND REVENUE ACT) SECTION 102, *See* Act No. XII of 1881, sections 93, 95 153

———— SECTION 205B—*Attachment of property of disqualified proprietor—Profits accruing after the release of the corpus of the property by the Court of Wards.*] *Held* that the prohibition contained in the second paragraph of section 205B of Act No. XIX of 1873 does not apply to the rents and profits of property which may accrue after the release of the *corpus* from the superintendence of the Court of Wards. *Himanchal Singh* v. *Jhamman Lal*, I. L. R., 22 All., 364, referred to.

Jhamman Lal *v.* Himanchal Singh, I. L. R., 24 All. ... 136

———1874—XIV (SCHEDULED DISTRICTS' ACT), SECTIONS 3, 5 AND 6, *See* Act No. XVIII of 1879, sections 6 and 8 348

———1876—XVIII (OUDH LAWS ACT), CHAPTER II—*Pre-emption—"Member of the village community"—Under-proprietor—Right of under-proprietor to pre-empt a mahal sold by a proprietor.*] *Held* that under clause 3 of section 9 of the Oudh Laws Act, 1876, a person holding an under-proprietary interest in a village, a portion of which, consisting of one entire mahal, was sold by the Court of Wards on behalf of the proprietor of the mahal, was entitled to pre-emption in respect of such mahal as against the vendor.

Drig Bijai Singh *v.* The Deputy Commissioner of Gonda, I. L. R., 24 All. 420

———1877—I (SPECIFIC RELIEF ACT), SECTION 9—*Civil Procedure Code, section* 43—*Summary suit for possession—Plaintiff restored to possession—Subsequent suit by plaintiff for mesne profits—Burden of proof.*] One Lachmi Narain died possessed of certain immovable property. He left him surviving a widow, Mukhta Kunwar. Narain Das obtained possession of some portion of the said immovable property, as he alleged, under a lease from Mukhta Kunwar, and held possession, at any rate, for some months, down to the 27th of November, 1897. After the death of Mukhta Kunwar, one Sheo Kumar, who claimed to be the adopted son of

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Mukhta Kunwar, by some means other than legal process, dispossessed Narain Das. Narain Das thereupon instituted a suit under section 9 of the Specific Relief Act, and, having obtained a decree in that suit, was restored to possession. He then instituted a suit against Sheo Kumar to recover mesne profits for the time during which he was out of possession. As to this suit it was *held* (1) that the suit was not liable to be defeated by reason of section 43 of the Code of Civil Procedure; and (2) that as to the other issues arising in the suit, the first was, whether the defendant was the true owner of the property, the burden of proving which was on him; and, secondly, if the defendant established his title, whether the plaintiff had such an interest in the property, under the lease set up by him or otherwise, as would entitle him to remain in possession as against the defendant.

Sheo Kumar *v.* Narain Das, I. L. R., 24 All. 501

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 42—*Declaratory decree—Burden of proof—Usufructuary mortgagee in possession seeking a declaration that the property is not saleable in execution of a decree on a prior mortgage.*] The plaintiff, a usufructuary mortgagee in possession, came into Court seeking a declaration that the mortgaged property was not saleable in execution of a decree for sale obtained by another mortgagee in a suit on a mortgage prior to his own, on the ground that to this suit the prior mortgagee had not made him a party. *Held* that in such a case the plaintiff had to prove, not only that he had obtained possession as a usufructuary mortgagee and was still in possession, but that his mortgage still subsisted and had not been discharged.

Chitta Singh *v.* Debi Din, I. L. R., 24 All. 170

——— III (INDIAN REGISTRATION ACT), SECTIONS 73, 74, 75, 76, AND 77—*Registration—Refusal of Sub-Registrar to register on the ground of denial of execution—Application to Registrar to order registration not made within the prescribed time—Suit in Civil Court to compel registration barred.*] When registration of a document has been refused by a Sub-Registrar under section 71 of the Indian Registration Act, 1877, on the ground of denial of execution by one of the alleged executants, no suit will lie in a Civil Court to compel registration unless an application has been made to the Registrar under section 73 of the Act to establish the right of the applicant to have the document registered, and made "within thirty days after the making of the order for refusal."

In computing the period of thirty days within which such last-mentioned application must be made, the applicant is not entitled to the exclusion of the time necessary for obtaining a copy of the Sub-Registrar's reasons for refusing to register.

When, under these circumstances, an application is made to the Registrar after the time limited has expired, and is rejected on the ground of limitation, such rejection cannot be considered as a refusal to register within the meaning of clause *(b)* of section 76 of the Act. *Bhagwan Singh* v. *Khuda Bakhsh*, I. L. R., 3 All., 397; *Edun* v. *Mahomed Siddik*, I. L. R., 9 Calc., 150; *Lakhimoni Chowdhrain* v. *Akroomoni Chowdhrain*, I. L. R., 9 Calc., 851; *Shama Charan Das* v. *Joyenoolah*, I. L. R., 11 Calc., 750; *Kunhimmu* v. *Viyyathamma*, I. L. R., 7 Mad., 535 and *Veeramma* v. *Abbiah*, I. L. R., 18 Mad., 99, referred to.

Udit Upadhia *v.* Imam Bandi Bibi, I. L. R., 24 All. ... 402

——— XV (INDIAN LIMITATION ACT) SCHEDULE II, ARTICLES 10, 120, 144—*Suit for pre-emption against heir of mortgagee by conditional sale—"Physical possession"—Accrual of cause of*

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action in suit for pre-emption of property mortgaged by conditional sale—Expiration of year of grace.] A suit brought to declare a right of pre-emption against the heir of a mortgagee by conditional sale, who has foreclosed, is governed, where the subject of the sale does not admit of physical possession and there is no registered instrument of sale, not by article 10 but by article 120 of schedule II of the Indian Limitation Act (No. XV of 1877), and limitation in such a suit runs from the expiration of the year of grace, that being the period when the right of the mortgagee has become mature: the mere fact that he has not enforced that right by a suit for possession is immaterial. *Ali Abbas* v. *Thakur Prasad*, I. L. R., 14 All., 405, followed.

Where the property sold was an undivided share in certain villages, *Held*, that the "subject of the sale" did not admit of "physical possession" within the meaning of article 10 of the Indian Limitation Act. The expression used by Stuart, C. J., in *Jageshar Singh* v. *Jawahir Singh*, I. L. R., 1 All., 311, in regard to the words 'actual possession," is applicable with still more certainty to the words "physical possession," by which is meant a "personal and immediate" possession. In the present case such possession could not have been taken by the mortgagee without enforcing partition: article 10 therefore did not apply.

Nor was article 144 applicable. Claims to pre-emption are specially considered in article 10, and although the particular claim in the present case did not (for the reasons above stated) fall within it, that did not affect the construction of article 144 as illustrated by article 10. A claim to enforce a right of pre-emption is, as the latter article shows, a claim impeaching another's right, and its primary object is to set aside the competing right. The circumstance that the plaint in the present suit inverted the proper order, and instead of first asking for the setting aside, and then asking possession as the consequence, had asked for possession "by setting aside" could not alter the nature of the action.

Batul Begam *v.* Mansur Ali Khan 17

ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLE 14—*Limitation—Execution of decree—Civil Procedure Code, sections* 320 *et seqq.—Sale held by Collector, but afterwards set aside—Suit by auction purchaser to have sale confirmed.*] In execution of a decree which had been transferred to the Collector for execution under the provisions of section 320 of the Code of Civil Procedure, certain immovable property was sold by auction on the 22nd of September 1891. But the judgment-debtors applied to the Collector to have the sale set aside, and on the 30th October 1891, the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. The order of the Collector setting aside the sale was, on appeal, confirmed by the Commissioner on the 4th of May 1892. After the setting aside of the sale the judgment-debtors, on the 14th of December 1891, with the permission of the Collector, mortgaged the bulk of property. The mortgage money was paid into Court in discharge of the decree, and satisfaction of the decree was entered up, and on the 21st of December 1891, the execution case was struck off. On the 12th of September 1894, the auction purchaser, who after the sale had been set aside had withdrawn the purchase money paid in by her, brought a suit to have the sale in her favour confirmed. *Held* that inasmuch as the plaintiff's claim involved the setting aside of the Collector's order of the 30th of October 1891, by which the sale to the plaintiff had been set aside, the suit was barred by limitation, having regard to article 14 of the second schedule to Act No. XV of 1877. *Malkarjun* v. *Narhari*, I. L. R., 25 Bom., 337 and *Banke Lal* v. *Jagat*

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Narain, I. L. R., 22 All., 168, referred to. *Ayyasami* v. *Samiya*, I. L. R., 8 Mad., 82 and *Debi Charan* v. *Bari Bahu*, Weekly Notes, 1894, p. 78, held not to be of effect since the ruling of the Privy Council in *Malkarjun* v. *Narhari*. *Moti Lal* v. *Karrabuldin*, I. L. R., 25 Calc., 179, distinguished.

Raghunath Prasad *v.* Kaniz Rasul, I. L. R., 24 All. ... 467

ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLES 23, 24, 25 AND 36—*Limitation—Suit to recover damages on account of injury caused by a false report made to the Police—Suit for damages for malicious prosecution—Suit for compensation for libel or slander.*] The defendant laid information at a Police station against the plaintiff, alleging that the plaintiff and several other persons entered the female apartments of the defendant, broke open locks, plundered his goods, and caused hurt to his wife. Thereupon an inquiry was made by the Police, with the result that the information was found to be false. The defendant was prosecuted under section 182 of the Indian Penal Code, convicted and sentenced to six months' imprisonment. The plaintiff thereafter sued to recover damages from the defendant "as compensation on account of mental distress and defamation."

Held that this was not a suit for damages on account of malicious prosecution, for no prosecution had been initiated, but it was a suit for compensation for libel or slander, the limitation applicable to which was that prescribed by art. 24 or art. 25 of the second schedule to Act No. XV of 1877. *Austin* v. *Dowling*, L. R., 5 C. P., 534, *Yates* v. *The Queen*, L. R., 14 Q. B. D., 648 and *Queen-Empress* v. *Bisheshar*, I. L. R., 16 All., 124, referred to.

Ishri *v.* Muhammad Hadi, I. L. R., 24 All. ... 368

SCHEDULE II, ARTICLES 29 AND 42—*Limitation—Suit for compensation for wrongful seizure of movable property under legal process—Suit for compensation for injury caused by an injunction wrongfully obtained.*] The defendant on the 18th of February, 1898, attached in execution of his decree certain country soap as being the property of his judgment-debtor. The plaintiff intervened claiming the soap as his, and his objection was allowed. The defendant thereupon instituted a suit under section 283 of the Code of Civil Procedure for declaration of the title of his judgment-debtor, but was defeated, and his appeal in that suit was dismissed on the 23rd of March, 1899. At the time of the institution of this suit the defendant applied for and obtained an injunction directing that the soap should not be made over to the plaintiff. Ultimately the plaintiff, on the 17th of June, 1899, after the dismissal of the defendant's appeal, obtained possession of the soap. He then sued the defendant to recover damages for the loss of part and the deterioration of the rest of the soap while under the defendant's attachment. *Held* that article 42, and not article 29 of the second schedule to the Indian Limitation Act, 1877, applied, and that the suit was not barred by limitation.

Idu Mian *v.* Rahmat-ullah, I. L. R., 24 All. 146

SCHEDULE II, ARTICLE 57,

See Act No. IX of 1872, section 176 251

SCHEDULE II, ARTICLE 89—*Suit for account between principal and agent—Termination of agency—"Movable property"—Money—Evidence as to account stated.*] The appellant and respondent, two brothers, were agents the one for the other in dealing with their joint estate, and the agency was found on the evidence to have continued until the

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22nd of December, 1885, when the appellant brought a suit against the respondent for his share of money received by the respondent on the joint account. *Held* by the Judicial Committee (upholding the judgment of the High Court) that a cross suit brought by the respondent against the appellant for an account was governed by article 89 of schedule II of the Indian Limitation Act, and having been brought within three years of the termination of the agency, it was not barred.

"Movable property" in article 89 includes money.

The appellant put forward a *rukka* and list evidencing a settlement of accounts supported by a substantial body of evidence of persons apparently of good repute, but which the respondent alleged to be fabricated. *Held* that the High Court rightly rejected the positive evidence in favour of the settlement when it appeared that the facts ascertained on other evidence in the case as to certain items in the list were conclusive to the contrary of what was there set out, and inconsistent with the existence of the alleged settlement.

Asghar Ali Khan *v.* Khurshed Ali Khan, I. L. R., 24 All. .. 27

ACTS—1877—XV (INDIAN LIMITATION ACT) SCHEDULE II, ARTICLE 119—*Limitation Adoption— Suit for possession of immovable property, plaintiff claiming as adopted son, his title as such having been denied more than six years before suit—Construction of document—Document of a testamentary nature—Declaration made in wajib-ul-arz by the sole proprietor of a village as to his wishes respecting the devolution of the property after his death.*] *Held* that art. 119 of the second schedule to the Indian Limitation Act, 1877, did not apply to a suit for possession of immovable property in which the plaintiff claimed as the adopted son of the last made owner of the property, and in which the plaintiff's adoption was denied by the defendant, and the plaintiff himself alleged that his right as adopted son had been interfered with more than six years before the institution of his suit.

Basdeo v. *Gopal*, I. L. R., 8 All., 644; *Ganga Sahai* v. *Lekhraj Singh*, I. L. R., 9 All., 253; *Ghandharap Singh* v. *Lachman Singh*, I. L. R., 10 All., 485; *Natthu Singh* v. *Gulab Singh*, I. L. R., 17 All., 167; *Lala Parbhu Lal* v. *Mylne*, I. L. R., 14 Calc., 401; *Jagannath Prasad Gupta* v. *Ranjit Singh*, I. L. R., 25 Calc., 354; *Padajirav* v. *Ramrav*, I. L. R., 13 Bom., 160; *Fannyamma* v. *Manjaya Hebbar*, I. L. R., 21 Bom., 159 and *Harilal Pranlal* v. *Bai Rewa*, I. L. R., 21 Bom., 376 followed. *Inda* v. *Jehangira*, Weekly Notes, 1890, p. 241; *Parvathi Ammal* v. *Saminatha Gurukal*, I. L. R., 20 Mad., 40 and *Shrinivas* v. *Hanmant*, I. L. R., 24 Bom., 260 dissented from. *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri*, I. L. R., 13 Calc., 308; *Mohesh Narain Munshi* v *Taruck Nath Moitra*, I. L. R., 20 Calc., 487 and *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar*, I. L. R., 22 Calc., 609 distinguished.

The sole proprietor of a certain village caused the following entry to be recorded in the village wajib-ul-arz :—

"I am the only zamindar in this village. I am a Marwari Brahmin. Seven years ago I adopted my sister's son, Murli. He is my heir and successor *(Malik)*. If, after this agreement, a son is born to me, half the property would be received by him and half by the adopted son. If more than one son be born to me, the property would be equally divided among them, including the adopted son, as brothers. I have two wives now. They will receive their maintenance from him (Murli)."

A son was born to the person making this declaration, but he died before the plaintiff's suit was instituted.

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As to the adoption of Murli it was found that, although Murli had been brought up by his alleged adoptive father, and more or less treated by him as his son, it was not satisfactorily proved that there had been any valid adoption, even if such adoption were legally possible.

Held that the declaration in the wajib-ul-arz above cited amounted to a testamentary declaration of the wishes of the proprietor of the village, and that the person described therein as the adopted son was entitled by virtue of it to half of the village. The description of the devisee as an adopted son was treated as a mere mis-description, which ought not to affect what appeared to be the real intention of the testator. *Fanindra Deb Raikut* v. *Rajeswar Dass*, L. R., 12 I. A., 72, at p. 89, and *Nidhoomoni Debya* v *Saroda Pershad Mookerjee*, L. R., 3 I. A., 253, referred to.

Lali *v.* Murlidhar, I. L. R., 24 All. 195

ACTS—1877—XV (INDIAN LIMITATION ACT), SCHEDULE II, ARTICLES 178 AND 179—*Execution of decree—Limitation—Decree for pre-emption—Time from which limitation begins to run against the decree-holder.*] Article 179 of the second schedule to the Indian Limitation Act, 1877, applies only where there is a decree or order which can at its date be executed. In the case of a decree for pre-emption there is no decree capable of execution until the decree-holder pays into Court the pre-emptive price. The first application, therefore, for execution of such a decree will be governed, not by article 179, but by article 178, and limitation commences to run against the decree-holder from the time when the pre-emptive price is paid. *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*, I. L. R., 17 All., 39, referred to.

Chhedi *v.* Lalu, I. L. R., 24 All. 300

——— SCHEDULE II, ARTICLES 178, 179, *See* Act No. IV of 1882, sections 86 and 87 543

——— 1878—XI (INDIAN ARMS ACT) *section* 19—"*Going armed*"—*The mere carrying of arms for purposes other than their use as such not an offence.*] One *C. N.*, a person entitled to possess and use fire-arms, gave a pistol to an acquaintance, who was not entitled to possess and use fire-arms, asking him to take it and get it repaired in a neighbouring town. This acquaintance gave the pistol to his father Harpal Rai, who was taking it into the town to get it repaired, when he was arrested, and charged with an offence under section 19 of the Indian Arms Act, 1878.

Held that Harpal Rai was under the circumstances guilty of no offence under the Arms Act.

The mere temporary possession, without a license of arms for purposes other than their use as such is not an offence within the meaning of section 19 of the Arms Act. *Queen-Empress* v. *Alexander William*, Weekly Notes, 1891, p. 208, *Queen-Empress* v. *Bhure*, Weekly Notes, 1892, p. 221, and *Queen-Empress* v. *Tota Ram*, Weekly Notes, 1894, p. 82, referred to.

Emperor *v.* Harpal Rai, I. L. R., 24 All. 454

——— 1879—XVIII (LEGAL PRACTITIONERS' ACT), SECTIONS 6 AND 8—*Act No. XIV of* 1874, *sections* 3, 5 *and* 6—*Kumaun Rules*, 27*th July* 1894, *rules* 2 *and* 11—*Jurisdiction of the High Court as regards enrolment of pleaders in the province of Kumaun and Garhwal.*] For the purposes of the Legal Practitioners' Act, 1879, the Commissioner of Kumaun is the High Court for the Province of Kumaun and Garhwal. A vakil, therefore, whose name is

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enrolled in the High Court of Judicature for the North-Western Provinces is not, by virtue of such enrolment, entitled to practise in the Courts of Kumaun and Garhwal, nor has the High Court of Judicature for the North-Western Provinces any jurisdiction to reverse an order of the Commissioner of Kumaun refusing to enrol a vakil on the roll of legal practitioners entitled to practise in the Courts of Kumaun and Garhwal.

In the matter of the petition of Padma Dat Joshi, I. L. R., 24 All. 348

ACTS—1881—XII (N.-W. P. RENT ACT), SECTION 23—*Suspension of revenue and consequent suspension of rent—Lessee entitled to benefit of suspension of rent.*] *Held* that when the Local Government, under section 23 of the N.-W. P. Rent Act, suspends payment of revenue, and when suspension of rent has, in consequence, been ordered, a lessee is entitled to the benefit of the latter suspension.

Madan Mohan Lal *v.* Dildar Husain, I. L. R., 24 All. ... 465

——— SECTIONS 42, 95, 206—*Landholder and tenant—Ejectment—Appraisement of tenant's crops—Assignment of right to receive price of crops—Mode in which such price can be realized—Jurisdiction—Civil and Revenue Courts—Actionable claim—Act No. IV of* 1882, *section* 135.] A zamindar ejected a tenant, and having done so, caused the value of the tenant's crops standing on the land to be assessed in the manner provided for by section 42 of the N.-W. P. Rent Act. The tenant assigned his right to get the assessed value of the crops from the zamindar to a third person.

Held on suit by the assignee to recover the amount of the assessment—(1) that the assignee's proper remedy was by suit in a Court of Revenue, and not by application to execute the order awarding compensation; (2) that the suit was not a suit of the nature cognizable by a Court of Small Causes; and (3) that the assignment to the plaintiff after the award had been made was not an assignment of an actionable claim within the meaning of section 135 of Act No. IV of 1882.

Mathura Das *v.* Murlidhar, I. L. R., 24 All. 517

——— SECTION 56—*Land-holder and tenant—Distraint—Hypothecation for rent of produce of land.*] *Held*, on a construction of section 56 of Act No. XII of 1881, that when the rent of a tenant is in arrears the landlord is entitled to distrain any crop growing on the tenant's holding, no matter by whom that crop was sown. *Geetum Singh* v. *Baldeo Kahar*, 4 N.-W. P., H. C., Rep., 76, and *Fatima Begam* v. *Hansi*, I. L. R., 9 All., 244, referred to.

Megh Singh *v.* Tika Ram, I. L. R., 24 All. 127

——— SECTIONS 93, 95—*Act No. XIX of* 1873, *section* 102—*Jurisdiction—Civil and Revenue Courts—Suit to eject as a trespasser a person who claimed to be entitled to the holding of a deceased occupancy tenant — Res judicata.*] Upon the death of an occupancy tenant, a person who alleged that he was entitled to succeed to the deceased's occupancy holding, obtained from the revenue authorities, by means of an application under section 102 of the N.-W. P. Land Revenue Act, mutation of names in his favour, and also got into possession of the holding. The zamindars thereupon brought a suit in a Civil Court for his ejectment, on the allegation that he was a mere trespasser, who had no right whatever to succeed to the holding of their late occupancy tenant. *Held* that such suit was properly brought in a Civil Court,

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and could not have been instituted in a Court of Revenue, and the decision of the Revenue authorities allowing mutation of names in the defendant's favour could not operate as *res judicata* in respect of such suit. *Subarni* v. *Bhagwan Khan*, I. L. R., 19 All., 101, distinguished.

Niadar *v.* Baru Mal, I. L. R., 24 All. 153

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 59 AND 123—*Mortgage—Signature of mortgagor—Mortgagor's name signed by the scribe of the document at the request and in the presence of an illiterate mortgagor—Signature held to be good—Maxim—Qui facit per alium facit per se—Construction of Statutes.*] It is not imperatively required by section 59 of the Transfer of Property Act, 1882, that a mortgage, where the principal money secured is Rs. 100 or upwards, shall be signed by the mortgagor with his own hand, or by an agent specially appointed in that behalf. If the mortgagor is illiterate, it is a good signature if, in the presence and at the request of the mortgagor, some other person signs the mortgagor's name on his behalf as executant of the document.

So held by Stanley, C.J. and Knox, Blair and Banerji, JJ., (Aikman, J., *dissentiente*) overruling the decision in *Moti Begam* v. *Zorawar Singh*, Weekly Notes, 1899, p. 196.

Per AIKMAN, J.—Whether or not the autograph signature of the executant is required to any particular document is usually a question of construction to be decided separately in each case. In the case of a mortgage executed in accordance with the provisions of section 59 of the Transfer of Property Act, 1882, the law requires the personal signature of the mortgagor.

In the course of the judgments the following authorities were referred to — *Hyde* v. *Johnson* 2 Bing. N. C., 776, *Spencer* v. *Metropolitan Board of Works* L. R., 22 Ch. D., 142, *The Queen* v. *The Justices of Kent* L. R., 8 Q. B., 305, *In re Whitley Partners, Ld.* L. R., 32 Ch. D., 337, *Luchmee Buxsh Boy* v. *Runjeet Ram Panday* 20 W. R. C. R., 375, *Budoo Bhoosun Bose* v. *Enaet Moonshee* 8 W. R., 1, *Ex parte Wallace* 14 Q. B. D., 22, *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* L. R., 1891 A. C., 531, and *Crawford* v. *Spooner*, 6 Moo. P. C., 1.

Deo Narain Rai *v.* Kukur Bind, I. L. R., 24 All. ... 319

——— SECTIONS 60, 92 AND 93—*Mortgage—Redemption—Decretal money not paid within the time limited by the decree—Decree not in accordance with the Transfer of Property Act—Subsequent suit for redemption not barred—Civil Procedure Code, sections* 13, 244—*Res judicata.*] The plaintiffs brought a suit for redemption of a usufructuary mortgage and obtained a decree for redemption, conditioned on their paying a certain sum within a time specified in the decree. This decree, however, instead of going on to direct that in default of payment by the due date the property should be sold, directed that if payment was not made within the time fixed the "judgment should be deemed to be non-existent." The plaintiff did not pay the decretal amount within the time fixed, but some years afterwards brought a second suit for redemption. *Held* that the second suit was not under the circumstances barred, either by reason of anything contained in the Transfer of Property Act, 1882, or by section 13 or section 244 of the Code of Civil Procedure. *David Hay* v. *Razi-ud-din*, I. L. R., 19 All., 202, overruled; *Sami Achari* v. *Somasund-ram Achari*, I. L. R., 6 Mad., 119; *Periandi* v. *Angappa*, I. L. R., 7 Mad., 423; *Karuthasami* v. *Jaganatha*, I. L. R., 8 Mad., 478;

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Ramunni v. *Brahma Dattan*, I. L. R., 15 Mad., 366; *Ramasami* v. *Sami*, I. L. R., 17 Mad., 96; *Vallabha Valiya Rajah* v. *Vedapuratti*, I. L. R., 19 Mad., 40; *Nainappa Chetti* v. *Chidambaram Chetti*, I. L. R., 21 Mad., 18; *Chaita* v. *Purum Sookh*, N.-W. P., H. C. Rep., 1867, p. 256; *Doobee Singh* v. *Jowkee Ram*, N.-W. P., H. C. Rep., 1868, p. 381; *Sheikh Golam Hoozein* v. *Mussumat Alla Rukhee Beebee*, N.-W. P., H. C. Rep, 1871, p. 62; *Anrudh Singh* v. *Sheo Prasad*, I. L. R., 4 All., 481; *Muhammad Samiuddin Khan* v. *Mannu Lal*, I. L. R., 11 All., 386; *Dondh Bahadur Rai* v. *Tek Narain Rai*, I. L. R., 21 All., 251; *Gan Savant Bal Savant* v. *Narayan Dhond Savant*, I. L. R., 7 Bom., 467; *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet*, I. L. R., 10 Bom., 461; *Maloji* v. *Sagaji*, I. L. R., 13 Bom., 567; *Roy Dinkar Doyal* v. *Sheo Golam Singh*, 22 W. R., C. R., 172, and *Nawab Azimut Ali Khan* v. *Jowahir Singh*, 13 Moo. I. A., 404, referred to.

Sita Ram *v.* Madho Lal, I. L. R., 24 All. 44

ACTS—1882—IV (TRANSFER OF PROPERTY ACT) SECTIONS 67, 85, 99—*Mortgage—Sale under a decree of equity of redemption—Rights of purchaser, the decree having become final.*] On the 22nd of March, 1881, one Nathu Ram mortgaged certain property with possession. On the 9th of May, 1881, the mortgagees leased the mortgaged property to Nathu Ram, who, as security for the rent due from him, further pledged his equity of redemption. The original mortgagees died. The rent due under the lease fell into arrears; and the successor in title of the mortgagees instituted a suit against the mortgagor to recover the amount due to him for arrears of rent by sale of the equity of redemption of the property. On the 27th of November, 1889, a decree for sale was passed, and on the 31st of March, 1890, an appeal against the decree for sale was rejected The property was accordingly sold by virtue of the decree for sale, and was purchased by the successor in title of the mortgagees on the 20th of April, 1891. The sons of Nathu Ram thereupon brought a suit, claiming proprietary possession of the property on the ground that the sale of the equity of redemption was illegal and void, and conveyed nothing to the purchaser.

Held that the sale having been the outcome of a suit under section 67 of the Transfer of Property Act, 1882, did not offend against section 99 of the Act, and that although, according to law as laid down by the High Court, the sale of an equity of redemption was not contemplated by the Transfer of Property Act, yet, inasmuch as the sale had taken place under a decree which had become final, it could not at that time be upset. *Matadin Kasodhan* v. *Kazim Husain*, I. L. R., 13 All., 432, and *Tara Chand* v. *Imdad Husain*, I. L. R., 18 All., 325, referred to.

Parmanand *v.* Daulat Ram, I. L. R., 24 All. 549

——— SECTION 74—*Mortgage—Rights of prior and subsequent incumbrancers inter se.*] The puisne mortgagees instituted a suit on their mortgage without making the prior mortgagees parties thereto, and got a decree for sale on the 6th April, 1895, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st September, 1896.

The prior mortgagees instituted a suit on their mortgage without making the puisne mortgagees parties thereto, and got a decree for sale on the 11th December, 1894, and purchased at the sale held in execution of that decree the property mortgaged to them on the 21st November, 1896, and obtained possession thereof on the 21st January, 1897.

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The puisne mortgagees then sued the prior mortgagees, claiming possession of the property purchased by the latter on payment of the actual purchase-money, or of the sum which was due upon their mortgage at the date of the institution of their suit

Held—(1) that the puisne mortgagees were entitled to be put into possession on payment to the prior mortgagees of the sum which was actually due upon the prior mortgage at the date upon which the prior mortgagees purchased, and (2) that such possession was, as to the property included in their own mortgage, proprietary; but, as to the property not so included, possession as mortgagees only: they were not entitled to the rights of the prior mortgagees as purchasers of the equity of redemption.

Delhi and London Bank *v.* Bhikari Das, I. L. R., 24 All.... 185

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 74—*See* Civil Procedure Code, section 244 179

SECTIONS 83 AND 84 —*Mortgage - Repayment of money lent—Lender not bound to accept payment in instalments unless he has so agreed.*] Where no stipulation of covenant has been made between the contracting parties as to the repayment of a sum borrowed, the lender is entitled to decline to receive payment of a sum due to him in instalments and he can claim that the whole sum due be paid at one and the same time.

Behari Lal *v.* Ram Ghulam, I. L. R., 24 All. 461

SECTION 85 — *See* Hindu law 211

SECTIONS 86 AND 87 —*Application for order absolute under section 87—Execution of decree—Limitation—Act No. XV of 1877, Schedule II, Articles 178 and 179.*] An application for an order absolute under section 87 of the Transfer of Property Act, 1882, is an application in execution of the decree under section 86 of the Act, and is governed as to limitation by Article 178 of the second schedule to the Indian Limitation Act, 1877, the time from which limitation begins to run being the date fixed by the decree under section 86 for payment of the mortgage money.

Kedar Nath v. *Lalji Sahai*, I. L. R., 12 All., 61; *Oudh Behari Lal* v. *Nageshar Lal*, I. L. R., 13 All., 278; *Chunni Lal* v. *Harnam Das*, I. L. R., 20 All., 302; *Parmeshri Lal* v. *Mohan Lal*, I. L. R., 20 All., 357; *Bhagwan Ramji Marwadi* v. *Ganu*, I. L. R., 23 Bom., 644; *Muhammad Suleman Khan* v. *Muhammad Yar Khan*, I. L. R., 17 All., 39; *Chedi* v. *Lalu*, Weekly Notes, 1902, p. 60; *Ram Sarup* v. *Ghaurani*, I. L. R., 21 All., 453; and *Ranbir Singh* v. *Drigpal Singh*, I. L. R., 16 All., 23, referred to.

Ali Ahmad *v.* Naziran Bibi, I. L. R., All., 24 542

SECTIONS 88 AND 89 —*Mortgage—Decree for sale after redemption of prior mortgages—Payment of money due on the prior mortgages after the time limited by the decree—Effect of such payment.*] In a suit for sale on a mortgage in which there were prior mortgages to be redeemed, the plaintiff obtained a decree for sale conditioned on his redeeming the prior mortgages within two months. He did not do so, but about four months after the date of the decree paid the money due on the prior mortgages into Court. *Held*, that the defendant having taken no steps to redeem, the plaintiff was entitled to the benefit of this payment, though made after time, and to a decree absolute for sale. *Nihali* v. *Mittar Sen*, I. L. R., 20

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All., 446; *Raham Ilahi Khan* v. *Ghasita*, I. L. R., 20 All., 375; and *Sita Ram* v. *Madho Lal*, I. L. R., 24 All., 44, referred to. *Ram Lal* v. *Tulsa Kuar*, I. L. R., 19 All., 180, distinguished.

Debi Prasad *v.* Jai Karan Singh, I. L. R., 24 All. ... 479

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 135, *See* Act No. XII of 1881, sections 42, 95, 206 517

———1887—I (GENERAL CLAUSES ACT), SECTION 3, CL. (13), *See* Act No. XII of 1887, section 24 381

———IX (PROVINCIAL SMALL CAUSE COURTS ACT), SCHEDULE II, CLAUSE (18)—*Small Cause Court suit—Jurisdiction—Suit relating to a trust—Suit to recover money paid to legal practitioner to institute suits, but not so expended.*] *Held* that a suit in which the plaintiff claimed from the defendant the refund of certain moneys alleged by the plaintiff to have been paid to the defendant, a legal practitioner, for the purpose of instituting certain suits, but not to have been so expended, was a suit which was within the cognizance of a Court of Small Causes, and was not a suit relating to a trust within the meaning of clause (18) of the second schedule to Act No. IX of 1887.

North-Western Commercial Banking Corporation *v.* Muhammad Ismail Khan, I. L. R., 24 All. ... 208

———XII (BENGAL CIVIL COURTS ACT), SECTION 24—*Act No. I of* 1887 *(General Clauses Act), section* 3, *clause* (13)—*Valuation of suit—Appeal—Suit for partition.*] In a suit for partition of the share of one only out of several co-sharers in immovable property, the proper valuation of the suit for purposes of jurisdiction is the value of the share sought to be separated from rest of the property, and not the value of the entire property out of which the share is to be taken.

Wajih-ud-din *v.* Wali-ullah, I. L. R., 24 All. 381

———1889—VII (SUCCESSION CERTIFICATE ACT) SECTION 4. *See Res judicata* 138

———1891—XIV (OUDH COURTS ACT), SECTION 8—*Appeal—Jurisdiction—Appeal below heard by a Court not properly constituted—Practice.*] The Oudh Courts Act (XIV of 1891), section 8, enacts that "an appeal from a decree or order of a Subordinate Judge to the Judicial Commissioner shall be heard by the Judicial Commissioner and the Additional Judicial Commissioner sitting together: provided (i) that the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and the amount or value of the matter in dispute or appeal to the Judicial Commissioner is the same sum or upwards; or (ii) that the decree or order appealed from involves directly or indirectly some claim or question to, or respecting property of, like amount or value. Where to an appeal before the Privy Council an objection was taken as a ground of appeal that a case coming within the above enactment had been heard on appeal by the Additional Judicial Commissioner sitting alone, the Judicial Committee allowed the appeal and remanded the case to be tried by a court properly constituted in accordance with the provisions of section 8 of Act XIV of 1891.

Ganga Bakhsh Singh *v.* Dalip Singh, I. L. R., 24 All. ... 13

———1894—I (LAND ACQUISITION ACT), SECTIONS 31 AND 32—*Land taken up for public purposes, such land being in the possession of a Hindu widow holding in right of her deceased husband—How compensation in respect of such land should be allotted.*] Where land which was taken up by the Government under the Land Acquisition Act for public purposes was held at the time by two widows

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holding the usual Hindu widow's life estate therein, it was *held* that the compensation awarded for such land should not be paid over to the widows, but should be invested in land to be held on similar terms. *Sheoratan Rai* v. *Mohri*, Weekly Notes, 1899, p. 96, followed.

Sheo Prasad Singh *v.* Jaleha Kunwar, I. L. R., 24 All. ... 189

ACTS—1899—II (INDIAN STAMP ACT), SECTIONS 35*(b)* AND 42—*Stamp—Penalty—Unstamped receipt.*] In applying proviso *(b)* of section 35 of Act No. II of 1899 the Court should not levy the duty of one anna as well as the penalty of one rupee, and when a receipt is admitted in evidence under the proviso above referred to, it is not necessary that the receipt should be endorsed in the manner provided for in section 42.

Reference under section 57 of Act No. II of 1899, I. L. R., 24 All. 374

——— SCHEDULE I, ARTICLES 23, 55, 62*(e)*—*Stamp*—"*Conveyance*"—"*Release*"—*Document executed by a benami purchaser professing to relinquish in favour of the real purchaser any claims which he might have in virtue of the purchase.*] *Held*, that a document by means of which the certified purchaser of property sold by auction in execution of a decree purported to relinquish in favour of a person whom he alleged to be the real purchaser of the property, any claims which he might have in respect of the property by reason of his being the certified purchaser thereof was to be stamped as a release according to article 55 of the first schedule to the Indian Stamp Act, 1899.

Reference under section 57 of Act No. II of 1899, I. L. R., 24 All. 372

——— (LOCAL)—1900—I (N.-W. P. AND OUDH MUNICIPALITIES ACT) SECTIONS 128*(c)*, AND 132—*Municipal Board, powers of—Bye-law—Bye-law held to be unreasonable and its enforcement refused.*] The English law as to the necessity of bye-laws being reasonable is applicable to bye-laws framed in the exercise of their statutory powers by Municipal Boards in India.

The Municipal Board of Naini Tal passed a bye-law under the powers conferred upon it by section 128, clause *(c)* of Local Act No. I of 1900 to the following effect, namely:—"No coolie, whether bearing loads or not, no servant except in attendance on his master, and no prostitute shall use the upper North Mall "(one of two parallel roads running along the north side of the Naini Tal lake)" at any time."

Held that as regards the words "no servant, except in attendance on his master"—this was under the circumstances an unreasonable bye-law, and the Court declined to give effect to it.

Emperor *v.* Bal Kishan, I. L. R., 24 All. 439

——— (LOCAL)—1900-1901 (MUNICIPALITIES ACT), SECTION 147—*Bye-laws of Municipality—Continuing breach—Recurring fine—Imposition of fine in advance.*] *Held*, that where, as in section 147 of Act No. I of 1900 (Local), it is directed that a breach of some law may be punished with a fine of a certain sum per diem so long as the breach continues, it is not competent to the Court to impose such fine in advance whilst sentencing an offender in respect of the original breach; but there must be proof of the continuing breach having been been committed. *Ram Krishna Biswas* v *Mohendro Nath Mozumdar*, I. L. R., 27 Calc., 565, followed.

Emperor *v.* Wazir Ahmad, I. L. R., 24 All. 309

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ADOPTION, *See* Act No. XV of 1877, schedule ii, article 119 ... 195

APPEAL, *See* Act No. XII of 1887, section 24 381

——— *See* Act No. XIV of 1891, section 8 13

——— *See* Civil Procedure Code, sections 2, 372 and 588(21) ... 342

——— *See* Civil Procedure Code, section 244 519

——— *See* Civil Procedure Code, sections 244, 294, 311 ... 108

——— *See* Civil Procedure Code, section 506 229

——— *See* Civil Procedure Code, sections 556, 558 and 591 ... 464

——— *See* Letters Patent, section 8 172

———Powers of High Court in——, *See* Criminal Procedure Code, section 562 306

——— to His Majesty in Council, *See* Civil Procedure Code, sections 596, 600 174

——— to His Majesty in Council, *See* Civil Procedure Code, section 596 236

ARBITRATION, *See* Award 164

——— *See* Civil Procedure Code, sections 510, 514 ... 312

ARMS, *See* Act No. XI of 1878, Section 19 454

AWARD, *See* Civil Procedure Code, section 506 229

———*Suit for specific enforcement of award Case in which compensation in money considered impossible to assess.*] The defendant leased a village to the plaintiff for a term of five years. In the second year of the lease disputes arose between the parties, which they agreed to submit to arbitration. On the questions submitted to him, the arbitrator delivered an award, which was to the effect—(1) that the lessee should surrender possession at a fixed time within the term of the lease; (2) that the lessee should pay the sum of Rs. 800 to the lessor; and (3) that as to arrears of rent due from the tenants, the lessee should obtain decrees and execute a conveyance of them to the lessor, who was to pay to the lessee the aggregate amount of the decrees.

The other terms of the award having been performed, the lessee sued for specific performance of the remainder. He filed with his plaint a number of decrees obtained by him against the tenants together with a sale-deed conveying those decrees to the defendant, and prayed that the defendant might be ordered to accept the conveyance and pay the amounts of the decrees.

Held that even if the award were bad, the defendant having acted on it and accepted the benefits it gave him, had precluded himself from impeaching it; also that the case was not one in which it was possible to assess compensation in money for the breach of the particular condition in the award, and that the plaintiff was entitled to specific performance of the award, and this was directed in terms of the order made in the case of *Bell* v. *Denver*, 54 Law Times Reports, 729.

Brij Mohan Lal *v.* Shiam Singh, I. L. R., 24 All. ... 164

BURDEN OF PROOF, *See* Act No. I of 1877, section 9 501

——— *See* Act No. I of 1877, section 42 170

——— *See* Hindu law 459, 547

BYE-LAW, *See* Act (Local) No. I of 1900, sections 128 *(c)*, and 132 ... 439

CAUSE OF ACTION—*Assignment of decree for costs—Costs realized by assignee—Decree reversed in appeal—Suit by successful*

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appellants to recover from the assignee the costs realized by him.] Certain appellants in the High Court obtained from that Court a decree dismissing the respondents' plaintiffs' suit with costs. That decree for costs was assigned by the decree-holders, and the assignee took out of Court in execution thereof the money which had been paid in satisfaction of it by the judgment-debtors. Subsequently that decree was reversed by the Privy Council, and the plaintiffs obtained a decree in their favour with costs in all Courts. After an infructuous attempt to get a portion of those costs from the assignee by way of execution of the order of the Privy Council, the decree-holders filed a separate suit against them for their recovery. *Held*, that the decree-holders had no cause of action for a suit to recover from the assignee the costs realized by him in the manner above described.

Lalta Prasad *v.* Sadiq Husen, I. L. R., 24 All. ... 288

CAUSE OF ACTION, *See* Civil Procedure Code, sections 43, 44 ... 553

CHARGE, *See* Act No. XLV of 1860, section 406 254

CIVIL AND REVENUE COURTS, *See* Act No. XII of 1881, sections 42, 95, 206 517

——— (Jurisdiction) *See* Act No. XII of 1881, sections 93, 95 153

CIVIL PROCEDURE CODE, SECTIONS 2, 372, 588(2)—*Application to be brought on to record of appeal as assignee of deceased appellant—Application rejected—No appeal from order rejecting application.*] *Held* that no appeal would lie from an order rejecting the application of a person who claimed to be brought on to the record of an appeal as being the assignee of the deceased sole appellant *Lalit Mohan Roy* v. *Shebock Chand Chowdhry*, 4 C. W. N., 403, followed. *Moti Ram* v. *Kundan Lal*, I. L. R., 22 All., 388, overruled. *Indo Mati* v. *Gaya Prasad*, I. L. R., 19 All., 142, explained and distinguished.

Jamna Bibi *v.* Sheikh Jhau, I. L. R., 24 All. 532

——— SECTIONS 2, 372 AND 588(21)—*Order allowing objection under section 372—"Order" or "decree"—Appeal.*] A suit was brought by one Mewa Ram against Tej Singh and others. That suit was decreed *ex parte*. An application was, however, made by the defendants under section 108 of the Code of Civil Procedure as the result of which the *ex parte* decree was set aside and the suit reinstated. Upon the restoration of the suit one Chabeli Ram, claiming to be an assignee of the rights of the original plaintiff, applied under section 372 of the Code that his own name might be substituted as plaintiff for that of Mewa Ram. The plaintiff did not oppose this application. But the defendants objected, and the application was rejected. Subsequently, on the same day, the suit was dismissed. Chabeli Ram appealed against the Court's order rejecting his application under section 372 of the Code. His appeal was allowed, and his name was brought on the record. This appeal seems to have been treated as also an appeal from the decree in the suit, and the Court made an order under section 562 of the Code remanding the suit for trial on merits.

Held on appeal from this order that no appeal lay to the lower appellate court from the order of the Court of first instance allowing the defendants' objections to Chabeli Ram's application under section 372 of the Code of Civil Procedure neither was such order a decree within the meaning of section 2. *Moti Ram* v. *Kundan Lal*, I. L. R., 22 All., 380, and *Indo Mati* v. *Gaya Prasad*, I. L. R., 19 All., 142, distinguished. *Lalit Mohan Roy* v. *Shebock Chand Chowdry*, 4 C. W. N., 403, referred to.

Tej Singh *v.* Chabeli Ram, I. L. R., 24 All. 342

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CIVIL PROCEDURE CODE, SECTION 13—*Res judicata—Assignment of the Government revenue of a village divided into "khatas"—Claim for interest on revenue in arrears—Decision as to one khata res judicata in respect of other khatas.*] The plaintiff was assignee of the Government revenue of a certain village. The village was divided into *khatas*, but the title to the revenue in respect of each and every *khata* was one and the same. The plaintiff sued to recover arrears of revenue due in respect of *khata* No. 29 with interest. On his right to receive interest being disputed, it was held that a previous decision of a competent Court between the same parties, but dealing with a claim for interest due on arrears of revenue payable in respect of *khata* No. 47, operated as *res judicata* as to the claim with regard to *khata* No. 29. *Ex parte Ador*, 2 Q. B. D., 574, *Madhavi* v. *Kelu*, I. L. R., 15 Mad., 264, *Kunji Amma* v. *Raman Menon*, I. L. R., 15 Mad., 494 and *Balkishan* v. *Kishan Lal*, I. L. R., 11 All., 148 referred to.

Chandi Prasad *v.* Maharaja Mahendra Mahendra Singh, I. L. R., 24 All. 112

SECTION 13, EXPLANATION II, *See* Res judicata 429

SECTIONS 13, 244, *See* Act No. IV of 1882, sections 60, 92, and 93 44

SECTION 25—*Transfer—Retransfer by District Judge to his own file of a case once transferred by him to the file of the Subordinate Judge.*] Where a District Judge has once exercised the powers conferred by section 25 of the Code of Civil Procedure, and transferred a case to his own files from the files of the Subordinate Judge, he cannot afterwards retransfer such case to the Subordinate Judge. *Sukharam* v. *Gangaram*, I. L. R., 13 Bom., 654, followed. *Sita Ram* v. *Nauni Dulaiya*, I. L. R., 21 All., 230, referred to.

Amir Begam *v.* Prahlad Das, I. L. R., 24 All. ... 304

SECTIONS 25, 403 ET SEQQ.—*Transfer—Application for leave to sue in* formâ pauperis *filed in Court of Subordinate Judge—Application transferred by District Judge to his own file—District Judge not thereafter competent to send the suit back to the Subordinate Judge for trial.*] A pauper plaintiff presented to a Subordinate Judge an application for leave to sue as a pauper. This application was, by means of an order under section 25 of the Code of Civil Procedure, taken on to the file of the District Judge and heard and granted by him. *Held* that the District Judge had no power subsequently to transfer the pauper suit thus initiated back to the file of the Subordinate Judge. *Amir Begam* v. *Prahlad Das*, Weekly Notes, 1902, p. 66, referred to.

Nandan Prasad *v.* Kenney, I. L. R., 24 All. ... 356

SECTIONS 31 AND 44—*Misjoinder of defendants and causes of action—Suit by transferee from heir of deceased Muhammadan against another heir and transferees from such other heir.*] A plaintiff came into Court claiming a portion of the inheritance of a deceased Muhammadan on the allegation that he had by two separate sale deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the deceased, who was in possession of some of it, and by certain transferees of other portions from the said heir. Both the remaining heir and the transferees from him were made defendants. *Held* that there was no misjoinder of parties of causes of action in such a suit. *Indar Kuar* v. *Gur Prasad* I. L. R., 11 All., 33, followed.

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With reference to the objection that the claim included both movable and immovable property, and that the leave of the Court for the joinder of the two claims had not been obtained, it was *held* that section 44 of the Code of Civil Procedure did not apply to such a case. *Giyana Sambandha Pandara Sannadhi* v. *Kundasami Tambiran* I. L. R., 10 Mad., 375, referred to.

Mazhar Ali Khan *v.* Sajjad Husain Khan, I. L. R., 24 All. 358

CIVIL PROCEDURE CODE, SECTION 43, *See* Act No. I of 1877, section 9 501

——— SECTION 43, *See* Res judicata ... 429

——— SECTIONS 43 AND 44—*Cause of action—Misjoinder of causes of action—Omission to claim all the reliefs to which plaintiff is entitled on the cause of action.*] One *R. D.* brought a suit against two persons *M.* and *G.*, claiming to recover certain cash and ornaments belonging to one Sahai, deceased. To that suit *B. R.* and *B.*, who had previously brought a suit for certain immovable property belonging to the same estate, applied to be, and were, added as defendants. After this *H. L.*, the son of *R. D.*, brought a suit claiming possession of a house which originally belonged to Sahai, and which was alleged to be then in the possession of *B. R.* and *B.*

Held that the provisions of section 43 of the Code of Civil Procedure did not apply to these facts so as to bar the suit brought by *H. L.*

Hingu Lal *v.* Baldeo Ram, I. L. R., 24 All. 553

——— SECTION 53—*Suit on a mortgage for sale or "any other relief to which the plaintiff might be entitled"—Subsequent prayer for money decree relinquishing claim for sale.*] The plaintiff, a mortgagee, came into Court asking for a decree for sale on his mortgage, or "any other relief to which the plaintiff might be entitled." The mortgage sued upon contained the usual covenant for payment, in addition to the further covenant that in default of payment proceedings might be taken against the mortgaged property. *Held* that there was nothing to prevent such plaintiff in the course of the suit relinquishing his claim for sale of the mortgaged property, and asking merely for a simple money decree. Such an amendment of the pleadings did not amount to a conversion of the suit into a suit of another and inconsistent character.

Sukhdeo Prasad *v.* Lachman Singh, I. L. R., 24 All. ... 456

——— SECTION 54, *See* Pre-emption ... 218

——— SECTIONS 80, 108—*Application to set aside a decree passed ex parte—Irregular service of summons.*] Where a serving officer finds a defendant to be away temporarily from home, and knows where he is, it is not a good service if he thereupon does no more than fix the summons to the outer door of the house; but he must make further efforts to effect personal service.

Sakina *v.* Gauri Sahai, I. L. R., 24 All. 302

——— SECTIONS 108, 443—*Guardian* ad litem—*Minor defendant not properly represented*—Ex parte *decree against minor—Application to set aside decree—How far the granting of such application should affect parties other than the applicant.*] A suit claiming payment of money alleged by the plaintiffs to be due on a balance of account was filed against three defendants, *viz.*, Bhura Mal, Musammat Gayatri, the daughter-in-

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law, and Jamna Das, the son of Bhura Mal. The second and third defendants being minors, Bhura Mal was named as their guardian, and a notice was issued to him under Rule 128 of the Rules of Court, calling upon him to state whether he was willing to act as guardian *ad litem* to the minor defendants; Bhura Mal was also duly served with a summons in the suit. Bhura Mal entered no appearance, but the Court nevertheless, though no order had been made appointing anyone as guardian *ad litem* for the minors, fixed a date for the hearing of the suit. Upon that date none of the defendants appeared, and the Court passed an *ex parte* decree against all three. On execution of this decree being taken out by the plaintiffs, applications were made on behalf of the minor defendants under section 108 of the Code of Civil Procedure to set aside the decree.

Held by the Full Bench, that there having been no appointment of Bhura Mal as guardian *ad litem* of the minor defendants in the manner prescribed by section 443 of the Code of Civil Procedure (mere notice to Bhura Mal of the proposal to appoint him being quite insufficient), the minors were entitled to have the decree set aside as against them. *Suresh Chunder Wum Chowdhry* v. *Jugut Chunder Deb*, I. L. R., 14 Calc., 204 and *Kesho Pershad* v. *Hirday Narain*, 6 C. L. R., 69, referred to by Aikman, J.

On the question whether the decree should be set aside as regards Bhura Mal also, it was *held* by Stanley, C.J., that where an order is made under section 108 of the Code of Civil Procedure, the decree set aside is primarily the whole decree and the suit to be proceeded with is the whole suit; though where a decree passed against several defendants consists in reality of separate decrees against each, it may be that the decree can be set aside in part. When a decree is one and indivisible it must be set aside in its entirety. *Mahomed Hamidulla* v. *Tohurennissa Bibi*, I. L. R., 25 Calc., 155 and *Ajodhya Pershad Singh* v. *Sheo Pershad Sahu*, 5 C. W. N., 58, referred to; *Manaku kom Pedru* v. *Sitaram Atmaram Vagh*, I. L. R., 18 Bom., 142, not followed.

Per BURKITT, J.—On the facts of the particular case the *ex parte* decree ought to be set aside as against all the defendants.

Per AIKMAN, J.—Section 108 of the Code of Civil Procedure primarily applies so far only as the particular defendant, who seeks to get an *ex parte* decree against him set aside, is concerned. *Huro Krishno Doss* v. *Motee Chand Baboo*, 8 W. R., C. R., 260, referred to. Though under certain circumstances it may be necessary in the interests of justice that the whole decree should be re-opened. Thus when the decree is one and indivisible it must be set aside as a whole or not at all, although the application to set aside the decree may be the application of only one of the defendants. *Dookhee Khan* v. *Rajessuree Ranee*, 15 W. R., C. R., 371, and *Monomohini Chowdhurani* v. *Nara Narayan Roy Chaudhri*, 4 C. W. N., 456, referred to.

The following cases were also considered in the judgment of Aikman, J.:—*Doorga Persaud Ghose* v. *Greeshchunder Bose*, 1 W. R., C. R., 222, *Brojonath Surmah Chuckerbatty* v. *Anund Moyee Debia Chowdhrain*, 7 W. R., C. R., 237, *Manaku kom Pedru* v. *Sitaram Atmaram Vagh*, I. L. R., 18 Bom., 142, *Mahomed Hamidulla* v. *Tohurennissa Bibi*, I. L. R., 25 Calc., 155.

Bhura Mal *v.* Har Kishan Das, I. L. R., 24 All. ... 383

CIVIL PROCEDURE CODE, SECTION 211—*Mesne profits—Allowance of expenses of collection of rents to a trespasser against whom a decree for mesne profits has been passed—Principle upon which such expenses should be allowed or disallowed.*] In estimating

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the mesne profits which the owner of land is entitled to recover from a trespasser the costs of collecting rents, which are ordinarily incurred by the owner, should be allowed to the trespasser only where such trespasser entered on the land in the exercise of a *bonâ fide* claim of right. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bonâ fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. *Altaf Ali* v. *Lalji Mal*, I. L. R., 1 All., 518, followed; *McArthur* v. *Cornwall*, L. R., 1892, A. C., 75; *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy*, L. R., 27 I. A., 110, referred to; *Abdul Gafur* v. *Raja Ram*, I. L. R., 23 All., 252, distinguished.

Dungar Mal *v.* Jai Ram, I. L. R., 24 All. 376

CIVIL PROCEDURE CODE, SECTION 244—*Execution of decree—Objection by judgment-debtor that more had been delivered to the auction purchaser than was included in his sale certificate—Objection disallowed—Appeal.*] Certain landed property was put up for sale in execution of a decree. On the property stood a house. After the sale the auction purchaser obtained possession of the house. The judgment-debtors objected that the house should not have been delivered, inasmuch as no mention was made of it in the sale certificate. This objection was disallowed. *Held*, that the order disallowing the judgment-debtor's objection did not fall within section 244 of the Code of Civil Procedure and was not otherwise appealable. *Mammod* v. *Locke*, I. L. R. 20 Mad., 487 and *Hira Lal Chatterji* v. *Gourmoni Debi*, I. L. R., 13 Calc., 326, referred to.

Ram Adhar *v.* Narain Das, I. L. R., 24 All. 519

——— SECTION 244—*Execution of decree—Question relating to the execution, discharge or satisfaction of the decree—Application to recover proceeds of sale from decree-holder after sale has been set aside.*] *Held*, that an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside, is an application which falls within section 244 of the Code of Civil Procedure.

Section 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties after the decree has been executed as it does to a dispute arising between them previous to execution.

Imdad Ali v. *Jagan Lal*, I. L. R., 17 All., 478, *Dhan Kuar* v. *Mahtab Singh*, I. L. R., 22 All., 79, and *Partab Singh* v. *Beni Ram*, I. L. R., 2 All., 61, referred to. *Ramchhaibar Misar* v. *Bechu Bhagat*, I. L. R., 7 All., 641, distinguished.

Collector of Jaunpur *v.* Bithal Das, I. L. R., 24 All. ... 291

——— SECTION 244—*Execution of decree—Suit for cancellation upon the ground of fraud of a sale held in execution of a decree—Proper remedy by application.*] Certain judgment-debtors brought a suit against the decree-holders and the auction-purchaser for cancellation of a sale held in execution of a decree, upon the allegations that the sale in question had been brought about by fraud, the decree having in fact been previously satisfied. *Held* that such a suit would not lie, the plaintiff's remedy being by application under section 244 of the Code of Civil

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Procedure. *Prosunno Coomar Sanyal* v. *Kasi Das Sanyal*, L. R. 19, I. A. 166; *Dhani Ram* v. *Chaturbhuj*, I. L. R., 22 All., 86; *Daulat Singh* v. *Jugal Kishore*, I. L. R., 22 All., 108, *Bhubon Mohan Pal* v. *Nunda Lal Dey*, I. L. R., 26 Calc., 324, and *Moti Lal Chakrbutty* v. *Russick Chandra Bairagi*, I. L. R., 26 Calc., 326, referred to.

Mathura Das *v.* Lachman Ram, I. L. R., 24 All. ... 239

CIVIL PROCEDURE CODE, SECTION 244—*Mortgage by conditional sale—Prior and puisne mortgagees—Payment by puisne mortgagee, defendant in prior mortgagee's suit for foreclosure, of amount due on the prior mortgage—Application by such puisne mortgagee for an order absolute for foreclosure—Application refused—Separate suit by puisne mortgagee for foreclosure—Act No. IV of* 1882 *(Transfer of Property Act), section* 47.] In July, 1889, one Fateh Chand executed a mortgage by conditional sale of a certain village in favour of Bansidhar and Kunj Bihari Lal. In October, 1889, Fateh Chand executed a second mortgage of the same village, also by way of conditional sale, in favour of Bansidhar and Anant Ram. In October, 1891, Anant Ram transferred his interest in the second mortgage to Gaya Prasad. In September, 1893, Bansidhar and Kunj Bihari instituted a suit for foreclosure of their mortgage. To that suit Raj Kumar, the son of the original mortgagor, and Gaya Prasad were made defendants. On the same date Gaya Prasad instituted a suit for foreclosure under the puisne mortgage of October, 1889. On the 22nd December foreclosure decrees were passed in both suits, and six months' time was allowed for redemption. The time allowed for redemption was extended from time to time, and ultimately, on the 3rd of January, 1896, Gaya Prasad paid into Court the sum which was due to the mortgagees on the mortgage, of July 1889, which sum was drawn out by the mortgagees. Subsequently to this payment into Court Gaya Prasad applied to the Court in the suit on the prior mortgage, and prayed that the right of the defendant in that suit to redeem the mortgaged property might be extinguished and an order absolute for foreclosure granted in the applicant's favour. This application was refused, on the ground that Gaya Prasad was only entitled to bring a suit for foreclosure and "had not acquired the status of a decree-holder," and that while he was a defendant, he could not execute the decree as a decree-holder and could not get a decree for absolute foreclosure. There was no appeal from this order, but Gaya Prasad submitted to it and brought a separate suit for foreclosure.

Held that under the above circumstances no such separate suit for foreclosure would lie.

Kedar Nath v. *Lalji Sahai*, I. L. R., 12 All., 61; *Oudh Behari Lal* v. *Nageshar Lal*, I. L. R., 13 All., 278 and *Ajudhia Pershad* v. *Baldeo Singh*, I. L. R., 21 Calc., 818, referred to.

Bansidhar *v.* Gaya Prasad, I. L. R., 24 All. 179

——— SECTION 244—*Sale in execution of decree—Compromise—Suit to set aside compromise and sale.*] In execution of a money decree the decree-holders attached and brought to sale the interest of their judgment-debtor in a certain village, and themselves purchased it. An objection to the sale was raised by the judgment-debtor, and while such objection was pending, the judgment-debtor's son is said to have entered into a compromise, whereby it was agreed that the decree-holders should take the village in full satisfaction of their decree, though it had, in fact, been sold, for only about three-quarters of the decretal amount, and that the sale should be confirmed on those terms.

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The judgment-debtor subsequently filed a suit against the decree-holders, asking for a declaration that the said compromise and the confirmation of sale were collusive and invalid, and were null and void, and ineffectual as against the plaintiff.

Held that such a suit was barred by the operation of section 244 of the Code of Civil Procedure. *Prosunno Coomar Sanyal* v. *Kazi Das Sanyal*, I. L. R., 19 I. A., 166, referred to.

Adhar Singh *v.* Sheo Prasad, I. L. R., 24 All. 209

CIVIL PROCEDURE CODE, SECTIONS 244, 294, 311—*Execution of decree—Joint decree—Sale in execution—Purchase by decree-holders—Receipt for part of decretal money given by one decree-holder on behalf of both—Sale set aside—Appeal.*] Two persons holding a joint decree caused certain immovable property of their judgment-debtor to be sold, and having obtained permission to bid, themselves became the purchasers. The property was knocked down to the two decree-holders jointly. An application was then made to the officer conducting the sale by one of the decree-holders auction purchasers, but purporting to act in the name of, and on behalf of the other auction purchaser as well, asking that the purchase money should be set off against the amount due under the decree, and that to that extent satisfaction of the decree should be entered up; he at the same time paid the auction fees. This application was made under the second clause of section 294 of the Code of Civil Procedure. A receipt for the amount of the purchase money was given to the Officer conducting the sale, and by him was forwarded to the Court of the Subordinate Judge, under whose orders the sale was held. The judgment-debtor subsequently made an application under section 311 to the Subordinate Judge, asking to have the sale set aside. That application was rejected; but the Subordinate Judge, instead of confirming the sale, set it aside, on the ground that only one of the decree-holders auction purchasers had put in the receipt under the second clause of section 294, and directed a re-sale, and this notwithstanding that the other decree-holder admitted that the receipt had been presented on his behalf also. On appeal to the District Judge the order of the Subordinate Judge was set aside and an order passed confirming the sale. From this order the judgment-debtor appealed to the High Court on the sole ground that no appeal lay to the District Judge.

Held that the order passed by the Subordinate Judge was appealable as an order passed under section 224 of the Code of Civil Procedure.

Makka *v.* Sri Ram, I. L. R., 24 All. 108

SECTION 246—*Execution of decree—Cross decrees—Set-off—Decree against which set-off is claimed not before the Court for execution.*] Section 246 of the Code of Civil Procedure clearly contemplates that where one decree is sought to be set off against another, the decree against which the set-off is asked for must be before the Court for execution. *Rewa Mahton* v. *Ram Kishen Singh*, L. R., 13 I. A., 106, p. 110, referred to.

Chajmal Das *v.* Lal Dharam Singh, I. L. R., 24 All. ... 481

SECTION 316—*Execution of decree—Sale in execution—Time from which the auction purchaser's title accrues.*] When immovable property is sold in execution of a decree the title of the auction purchaser to mesne profits or possession does not accrue until the sale has been confirmed. *Gobind Ram* v. *Tulsi Ram*, Weekly Notes, 1887, p. 217 and *Prem Chand Paul* v. *Purnima Dasi*, I. L. R., 15 Calc., 546, followed.

Amir Kazim *v.* Darbari Mal, I. L. R., 24 All. 475

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CIVIL PROCEDURE CODE, SECTION 320 ET SEQQ, *See* Act No. XV of 1877, schedule II, article 14 467

——— SECTION 506—*Award - Appeal from a decree based upon an award—"All the parties to the suit."*] *Held* that the words "all the parties to a suit" in section 506 of the Code of Civil Procedure refer to the succeeding words of the same section "any matter in difference between them in the suit," and would not necessarily include parties who never put in any appearance in the Court, and between whom and any of the parties to the submission there was not in fact any matter in difference in the suit. *Deo Nandan* v. *Bhirgu Rai*, Weekly Notes, 1887, p. 215.

Pitam Mal *v.* Sadiq Ali, I. L. R., 24 All. 229

——— SECTIONS 510, 514—*Arbitration—Delegation of their duties by the arbitrators—Award not submitted by the arbitrators within the time limited by the Court.*] The parties to a suit for winding up a partnership agreed to refer the suit to arbitration, and two arbitrators were appointed by the Court. The parties subsequently agreed that the matters in dispute should be settled by one Saif Ali, who was within a certain time to send in his opinion to the arbitrators in order that they might submit to the Court an award in accordance therewith. Saif Ali sent in his opinion to the arbitrators some days before the time fixed by the Court for the submission of the award; but the arbitrators did not submit their award within time. *Held*, that the agreement of the parties to let the matters in dispute be settled actually by Saif Ali could not possibly have the effect of superseding the appointment of arbitrators by the Court. Before the Court could proceed to hear the suit it was necessary that it should itself make, under either section 510 or section 514, an order superseding the reference to arbitration.

Jamna Kunwar *v.* Nasib Ali, I. L. R., 24 All. ... 312

——— SECTIONS 556, 558 AND 591—*Appeal—Order for re-admission of appeal dismissed for default not capable of being used by the appellant as a ground of objection to the decree.*] An order under section 558 of the Code of Civil Procedure readmitting an appeal which had been dismissed for default under section 556 is not appealable; neither is it an order "affecting the decision of the case" which "may be set forth as a ground of objection in the memorandum of appeal" from the decree in the suit within the meaning of section 591 of the Code. *Chintamony Dassi* v. *Raghoonath Sahoo*, I. L. R., 22 Calc., 981, followed.

Gulab Kunwar *v.* Thakur Das, I. L. R., 24 All. ... 464

——— SECTION 583 — *Decree reversed on appeal after possession obtained thereunder—Application for possession and mesne profits—Disallowance of application as regards mesne profit—Subsequent suit for mesne profits.*] *S. N.* obtained a decree for foreclosure on a mortgage against *R. R.* Against this decree *R. R.* appealed to the High Court; but pending the appeal *S. N.* obtained an order absolute for foreclosure, and got possession of the mortgaged property. Subsequently the High Court set aside the order for foreclosure and modified the decree of the first Court. *R. R.* paid up the amount found by the decree of the High Court to be due by him. He then applied to the Court for restoration of possession of the mortgaged property under section 583 of the Code of Civil Procedure, and for mesne profits for the time during which he had been out of possession. His application for mesne profits was rejected, and he thereupon filed a separate suit for mesne profits.

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Held that such a suit would not lie, the plaintiff not having appealed from the order refusing his application for mesne profits.

Sri Nath Sahai *v.* Ram Ratan Lal, I. L. R., 24 All. ... 361

CIVIL PROCEDURE CODE, SECTION 596—*Appeal to His Majesty in Council—Decree involving indirectly some question respecting property of the value of ten thousand rupees or upwards.*] When, as in section 596 of the Code of Civil Procedure, it is laid down that in order that an appeal may lie to His Majesty in Council the decree to be appealed from must involve, directly or indirectly, some claim or question to, or respecting property of ten thousand rupees in value or upwards, the reference is to suits in existence. It is not enough that the question decided by such decree is a question of title which may possibly affect the title of persons who are not parties to the decree to property not the subject-matter of the suit in which the decree was passed, and concerning the title to which property there is no litigation pending. *Radha Krishn Das* v. *Rai Krishn Chand*, I. L. R., 23 All., 415; *Banarsi Prasad* v. *Kashi Krishna Narain*, I. L. R., 23 All., 227; *Moofti Mohummud Ubdoollah* v. *Baboo Mootechund*, 1 Moo., I. A., 363; and *Baboo Gopal Lall Thakoor* v. *Teluk Chander Rai*, 7 Moo., I. A., 548 referred to.

Hanuman Prasad *v.* Bhagwati Prasad, I. L. R., 24 All. ... 236

——— SECTIONS 596, 600—*Privy Council, Practice of—Case below appealable value in Court of first instance—Addition of interest for purpose of valuation of subject-matter of suit—Special leave to appeal—Substantial question of law—Rule as to applications for special leave to appeal in Indian cases.*] Before a case can be certified as a fit one for appeal to His Majesty in Council, the condition prescribed in section 596 of the Civil Procedure Code as to the amount of the subject-matter of the suit in the Court of first instance *and* the amount in dispute on the appeal must both be fulfilled. The word "and" in that portion of the section cannot be read as "or."

Where a case is otherwise unappealable the rule of the Judicial Committee is not to give special leave to appeal unless there is some substantial question of law of general interest involved.

In this case the Judicial Committee laid down a rule to be followed in future in Indian cases, that where a party applies to the Committee for special leave to appeal, the matter being under the appealable value, he should first have applied to the Court below for a certificate under section 600 of the Code of Civil Procedure that the case is otherwise a fit one for appeal to His Majesty in Council. But this rule will not bind the Judicial Committee not to grant such leave in any special case, although that course has not been followed.

Semble—The amount of the subject-matter of a suit in the Court of first instance for the purpose of an appeal to His Majesty in Council is the amount for which a decree is recovered, including interest up to the date of the decree. Interest subsequent to decree cannot, though ascertainable, be added for the purpose of bringing the value up to the appealable amount of Rs. 10,000.

Moti Chand *v.* Ganga Prasad Singh, I. L. R., 24 All. ... 174

——— SECTIONS 640, 404, 592, *See* Letters Patent, section 8 172

"CONVEYANCE," *See* Act No. II of 1899, schedule I, articles 23, 55, 62(g) 372

CONSTRUCTION OF DOCUMENT, *See* Act No. XV of 1877, schedule II, article 119 195

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CONSTRUCTION OF STATUTES, *See* Act No. IV of 1882, sections 59 and 123 319

COSTS, *See* Cause of Action 288

COURT OF WARDS, *See* Act No. XIX of 1873, section 205B ... 136

COURT-FEE, *See* Pre-Emption 218

CRIMINAL PROCEDURE CODE, SECTIONS 107(2), 192—*Security for keeping the peace—Transfer—Power of District Magistrate to transfer proceedings instituted by him against a person not within his district.*] *Held* that it was competent to a District Magistrate who had initiated proceedings under section 107 (2) of the Code of Criminal Procedure against a person not at the time within the limits of his jurisdiction to transfer such proceedings at a later stage to a Magistrate subordinate to himself, though such Magistrate was not competent to initiate such proceedings.

King-Emperor *v.* Munna, I. L. R., 24 All. 151

——— SECTIONS 110 ET SEQQ.; 437—*Security for good behaviour—Power of District Magistrate to reopen proceedings on the same record after the discharge of the person called upon to show cause by a Magistrate of the first class.*] *Held* that it is competent to the Magistrate of the district, in the case of a person who has been called upon, under section 110 of the Code of Criminal Procedure, by a Magistrate of the first class, to show cause why he should not furnish security for good behaviour, and has been discharged by such Magistrate under section 119 of the Code, to institute fresh proceedings against such person upon the basis of the record that was before the first class Magistrate. *Queen-Empress* v. *Mutasaddi Lal*, I. L. R., 21 All., 107; *Queen-Empress* v. *Ratti*, Weekly Notes, 1899, p. 203, *Queen-Empress* v. *Ahmad Khan*, Weekly Notes, 1900, p. 206; and *Queen-Empress* v. *Iman Mondal*, I. L. R., 27 Calc., 662, referred to

King-Emperor *v.* Fyaz-ud-din, I. L. R., 24 All. ... 148

——— SECTION 110 ET SEQQ.—*Security for good behaviour—Power of Court to assign geographical limits within which the sureties required must reside.*] *Held* that a Court in ordering security for good behaviour to be given with sureties is competent to assign some geographical limits within which the sureties required must reside. *Queen-Empress* v. *Rahim Bakhsh*, I. L. R., 20 All., 206, referred to.

Emperor *v.* Nabbu Khan, I. L. R., 24 All. 471

——— SECTION 188—*Offence committed outside British India by a Native Indian subject of His Majesty — Certificate of Political Agent not obtained before making inquiry.*] Where an inquiry into an offence to which section 188 of the Code of Criminal Procedure was applicable was commenced without the certificate provided for by that section having been obtained, it was *held* that the proceedings were void, and that the subsequent commitment to the Court of Session must be quashed, notwithstanding that the necessary certificate was in fact granted some days before the commitment was made, though at the time of the commitment being made it had not come into the hands of the Committing Magistrate.

Emperor *v.* Kali Charan, I. L. R., 24 All. 256

——— SECTION 145—*No decision come to by Magistrate as to party in possession—Application for revision at instance of party who could not in his own right be*

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entitled to immediate possession—Practice.] *Held* that where a Magistrate, after entertaining proceedings under section 145 of the Code of Criminal Procedure, had declined to make any order declaring one or other of the contending parties in possession, the High Court would not interfere in revision at the instance of a person who, though apparently the next reversioner to the estate, could for the time being have no possible right on his own behalf to present possession. *Laldhari Singh* v. *Sukhdeo Narain Singh*, I. L. R., 27 Calc., 892, and *Anesh Mollah* v. *Ejaharuddi Mollah*, I. L. R., 28 Calc., 446, distinguished.

Behari Lal. In the matter of the petition of ——, I. L. R., 24 All. 443

CRIMINAL PROCEDURE CODE, SECTIONS 145, 435, 439, *See* Statutes —24 and 25 Vic., Cap. civ., section 15 315

—— SECTIONS 222, 234, *See* Act No. XLV of 1860, section 406 254

—— SECTION 523*(d)*, *See* Criminal Procedure Code, section 562 306

—— SECTIONS 435, 438, 439—*Practice—Revision—Reference by District Magistrate recommending the reconsideration of an order of acquittal passed by a Subordinate Magistrate.*] In the case of an acquittal by a Subordinate Magistrate, where the Local Government does not appeal, or where the District Magistrate does not move the Local Government to appeal, the High Court will not, as a general rule, entertain a reference direct from the District Magistrate under section 438 of the Code of Criminal Procedure.

In the matter of Sheikh Amin-ud-din, I. L. R., 24 All. ... 346

—— SECTION 451 — *European British subject—Right of European British subject to be tried by a jury —Such right claimable at any time before accused has entered upon his defence, notwithstanding previous waiver.*] One Sullivan was sent for trial to the District Magistrate of Meerut, the offence alleged against him being one under section 354 of the Indian Penal Code, *i. e.*, a warrant-case. At the outset of the proceedings the accused was asked whether he wished to be tried by a jury, and replied in the negative. A charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were ordered to be recalled for cross-examination. After the charge was framed, but before the accused had entered upon his defence, an application for a jury was presented on behalf of the accused. The Magistrate disallowed this application.

Held, that the fact that the accused, before the trial had begun, had stated that he did not wish for a jury, did not prevent him from afterwards claiming a jury within the time allowed by section 451(1) of the Code of Criminal Procedure, and that the Magistrate was wrong in disallowing the application.

Emperor *v.* Sullivan, I. L. R., 24 All. 511

—— SECTION 562 — *First offender — Powers conferred by section 562 exerciseable by a Court of Appeal—Criminal Procedure Code, section 523(d).*] *Held*, that the powers conferred by section 562 of the Code of Criminal Procedure upon a Court by which a first offender is convicted, are by virtue of section 423*(d)* of the Code, exerciseable by the High Court sitting as a Court of appeal.

Emperor *v.* Birch, I. L. R., 24 All. 306

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CUSTOM, *See* Act No. I of 1872, section 44 242

——— *See* Hindu Law 273

DECLARATORY DECREE, *See* Act No. 1 of 1877, section 42 ... 170

DECREE, *See* Civil Procedure Code, sections 2, 372 and 588(21) ... 342

———. Finality of——, *See* Act No. IV of 1882, sections 67, 85, 99 549

——— *Ex parte*——*See* Civil Procedure Code, sections 80, 108 ... 302

——— *See* Civil Procedure Code, sections 108 and 443 ... 383

———, Instalment——, *See* Execution of decree 85

DISTRAINT, *See* Act No. XII of 1881, section 56 127

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——— *See* Act No. I of 1872, section 32, clauses (5) and (6) ... 94

EQUITY OF REDEMPTION, *See* Act No. IV of 1882, sections 67, 85, 99 549

EUROPEAN BRITISH SUBJECT, *See* Criminal Procedure Code, section 451 511

EVIDENCE—*Legitimacy—Possible length to which the period of gestation may be protracted discussed.*] Where a child born some 365 days after the last period at which he could have been begotten by the husband of his mother was set up as legitimate, it was held that although such a period of gestation was perhaps not absolutely beyond the bounds of possibility, yet there being evidence that the mother had been married to her husband for ten years without having had any children by him, and also evidence which pointed strongly to the conclusion of immorality on the part of the mother, the only reasonable finding was against the legitimacy of the child.

Tikam Singh *v.* Dhan Kunwar, I. L. R., 24 All. ... 445

——— *Possession—Presumption—Evidence of possession of certain specific property treated as evidence of possession as regards an appendage to such property, though no definite acts of possession were proved as to the appendage—Limitation.*] Where, on the right to the produce of certain trees being called in question, it was found that the plaintiffs had not for twelve years previous to the filing of the suit done any specific acts indicating directly their possession of the trees, but that the trees nevertheless grew out of a wall which surrounded a garden in possession of the plaintiffs, it was *held* that the possession of the garden imported possession of the garden wall and of the trees springing out of the wall, and the suit was not barred by limitation. *Rajkumar Roy* v. *Gobind Chunder Roy*, I. L. R., 19 Calc., 660; *Asghar Reza* v. *Mehdi Hossain*, I. L. R., 20 Calc., 560 and *Mohima Chunder Mozoomdar* v. *Mohesh Chandar Neoghi*, I. L. R., 16 Calc., 473, referred to.

Iqbal Husen *v.* Nand Kishore, I. L. R., 24 All. ... 294

——— *See* Act No. I of 1872, section 32, clauses (5) and (6) ... 94

——— *See* Act No. I of 1872, section 44 242

EDUCATION OF DECREE—*Decree payable by instalments—Tender—Payment by money-order where creditor had to send to the Post Office for the money—Implied authority to pay in a certain manner.*] A judgment-debtor under an instalment decree remitted the amount payable on account of one instalment to one of the decree-holders by money-order. The decree-holder payee was at the time living in a village where he would have had to go himself or send some one to take the money from the Post Office; but, on the other hand, two previous instalments had been paid in a similar

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manner without objection on the part of the decree-holder. On this occasion the decree-holder payee temporized, so that the money was not at once returned by the Post Office to the sender, and subsequently applied for execution of the whole decree on the ground that there had been no valid payment of this instalment.

Held that the decree-holder by not refusing the money-order at once had prevented the judgment-debtor from having an opportunity to pay the instalment within time: he had not acted in good faith, and ought not to be allowed to take advantage of his action, even if the previous acceptance of payments made in the same manner did not amount to an implied authority to the judgment-debtor to pay by money-order. *Polglass* v. *Oliver*, 37 R. R., 623, referred to.

Kishan Prasad *v.* Beni Ram, I. L. R., 24 All ... 85

EXECUTION OF DECREE, *See* Act No. XIX of 1873, section 205B ... 136

——— *See* Act No. XIV of 1877, Schedule II, Article 14 467

——— *See* Act No. XV of 1877, Schedule II, Articles 178 and 179... 300

——— *See* Act No. IV of 1882, sections 86 and 87, 542

——— *See* Act No. IV of 1882, sections 88 and 89, 479

——— *See* Civil Procedure Code, section 244 209, 239, [291, 519

——— *See* Civil Procedure Code, sections 244, 294, 311 108

——— *See* Civil Procedure Code, section 246 ... 475

——— *See* Civil Procedure Code, section 316 ... 481

——— *See Res judicata* 138, 282

FORECLOSURE, *See* Act No. IV of 1882, sections 86 and 87 ... 542

GUARDIAN *ad litem*, *See* Civil Procedure Code, sections 108 and 443 383

HINDU LAW — *Custom — Mitakshara and Mayukha Schools of Law—Hindu Law—Proof of family custom at variance with Hindu Law—Governing law of migrating families.*] A family custom alleged to exist amongst the Abhan Thakurs of Oudh, in derogation of the ordinary Mitakshara law in force there, that on the extinction of the line one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor was held by the Judicial Committee not to be proved by four instances of the custom of comparatively modern date which their Lordships found to be the only portions of the evidence adduced which supported it.

Chandika Bakhsh *v.* Muna Kunwar, I. L. R., 24 All. ... 273

——— *Hindu widow—Alienation for legal necessity—Duty of person advancing money to a Hindu widow—Burden of proof.*] If a mortgagee advances money to a Hindu widow holding a widow's estate in the property mortgaged after making proper inquiry for the purpose of ascertaining that the money is required for legal necessity, it is not incumbent on him to see that the money he advances is applied to meet such legal necessity, nor is he bound to ascertain that every pice of the money so advanced is actually required for a legal necessity. *Amar Nath Sah* v. *Achan Kunwar*, I. L. R., 14 All., 420, referred to.

Ghansham Singh *v.* Badiya Lal, I. L. R., 24 All. ... 547

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HINDU LAW—*Hindu widow — Widow's right to maintenance — Maintenance not a charge on the joint family property unless made so by a decree or by agreement.*] The right of a Hindu widow to maintenance is not a charge upon the estate of her deceased husband unless and until it is fixed, and charged upon the estate by a decree or by agreement; and if such estate has been alienated and is in the hands of a *bonâ fide* transferee, the widow cannot follow the property, even though it be the case that the transferee had notice of her claim for maintenance. *Sheo Buksh Singh* v. *Mussumat Gunneshee Koonwur*, S. D. A., N.-W. P., 1864, Vol. I, p. 228; *Lakshman Ramchandra Joshi* v. *Satyabhamabai*, I. L. R., 2 Bom., 494, and *Ram Kunwar* v. *Ram Dai*, I. L. R., 22 All., 326, referred to.

Bhartpur State *v.* Gopal Dei, I. L. R., 24 All. ... 160

———*Joint Hindu family—Mortgage—Liability of non-executant members on a mortgage executed by some only of the members of a joint Hindu family—Burden of proof.*] In a suit for sale on a mortgage of the joint family property executed by the father and three of his sons, the plaintiff made defendants, besides the executants, the fourth son, who was a minor and four grandsons, also minors. *Held* that the non-executant members of the family were properly arrayed as defendants to the suit, inasmuch as their own interests in the joint family property would be liable under the mortgage, unless they could show either that the mortgage debt was never incurred, or that it no longer subsisted, or that it was tainted with immorality. *Jumna* v. *Nain Sukh*, I. L. R., 9 All., 493, held to be no longer law. *Badri Prasad* v. *Madan Lal*, I. L. R., 15 All., 75 and *Nanomi Babuasin* v. *Modhun Mohun*, I. L. R., 13 Calc., 21, referred to.

Debi Dat *v.* Jadu Rai, I. L. R., 24 All. 459

———*Joint Hindu family—Mortgage of an undivided share—Effect on such mortgage of a subsequent partition.*] A mortgage of an undivided share which under a partition has been allotted to another co-sharer cannot, in the absence of fraud, be enforced by the mortgagee against the share originally mortgaged, but the mortgagee's sole remedy is to proceed against the share which has been allotted to his mortgagor in lieu of the share mortgaged. *Byjnath Lall* v. *Ramoodeen Chowdry*, L. R., 1 I. A., 106 and *Hem Chunder Ghose* v. *Thako Moni Debi*, I. L. R., 20 Calc., 533, referred to.

Amolak Ram *v.* Chandan Singh, I. L. R., 24 All. ... 483

———*Maharashtra School—Succession—Place of daughter in the list of heirs.*] *Held*, that according to the Maharashtra school of Hindu law the daughter is a preferential heir to the widow of a predeceased brother's son, or to the adopted son of such widow, where no authority for the adoption has been given by the deceased husband of the adopter. *Nihalchand Harakchand* v. *Hemchand*, I. L. R., 9 Bom., 31, referred to.

Sita Ram *v.* Chintaman, I. L. R., 24 All. 472

———*Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan.*] The share which is taken by the mother in a joint Hindu family upon partition of the family property being her *stridhan* she is capable of alienating it at her pleasure.

Sri Pal Rai *v.* Surajbali, I. L. R., 24 All. 82

———*Mitakshara — Joint Hindu family — Mortgage by father—Suit for sale on mortgage, son not being made a party—Subsequent suit by son for declaration that his share is not liable*

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under the mortgage decree against father—Further plea that the mortgage-debt was contracted for immoral purposes—Act No. IV of 1882 *(Transfer of Property Act), section* 85.] The mortgagees to a mortgage of joint family property made by the father in a joint Hindu family, consisting of father and son, brought a suit for sale against the father without making the son a party, and obtained a decree for sale of the entire property mortgaged. The son sued the mortgagees for a declaration that his share was not bound by the decree, firstly, because he was not made a party to the mortgagee's suit for sale, and secondly, because the mortgage-debt was contracted by his father for immoral or impious purposes. It was found in that suit that the mortgagees had at least constructive notice of the son's existence, and ought to have made him a party to their suit for sale. But it was also found in the son's suit that the original mortgage debt of the father was not contracted for immoral or impious purposes.

Held that although the son might have been entitled to the decree sought by him, had he contented himself with raising the first plea only; yet, inasmuch as he himself had raised the issue of the immorality of the debt, which had been found against him, and as that was the only issue which could in any subsequent suit be raised as between himself and the mortgages, he was not in this suit entitled to any decree save a decree for redemption if he should desire to redeem. *Lala Suraj Prosad* v. *Golab Chand*, I. L. R, 28 Calc., 517 followed.

Held also that the mere fact that the son had asserted his right to a moiety of the mortgaged property, and had brought the suit above referred to, did not work a partition of the property or create any separate title in the son. *Padarath Singh* v. *Raja Ram*, I. L. R., 4 All., 235 referred to.

Kanhaia Lal *v.* Raj Bahadur, I. L. R., 24 All. 211

HINDU LAW—*Mitakshara—Joint Hindu family—Partition—Share of mother on partition—Stridhan.*] According to the Mitakshara law the share which the mother in a joint Hindu family obtains on partition, after the death of the father, of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband. *Bilaso* v. *Dina Nath*, I. L. R., 3 All., 88; *Bhagwandeen Doobey* v. *Myna Baee*, 11 Moo., I. A., 487; *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*, 11 Moo., I. A., 139; *Chotay Lall* v. *Chunno Lall*, L. R., 6 I. A., 15; *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*, I. L. R., 3 Mad., 290; *Mohabeer Pershad* v. *Ramyad Singh*, 20 W. R., 192; *Lalljeet Singh* v. *Raj Coomar Singh*, 20 W. R., 336; *Sheodyal Tewaree* v. *Judoo Nath Tewaree*, 9 W. R., 61; *Hemangini Dasi* v. *Kedar Nath Kundu Chowdhry*, I. L. R., 16 Calc., 758; *Beni Parshad* v. *Puran Chand*, I. L. R., 23 Calc., 263, and *Ganpat Rao* v. *Ram Chandar*, I. L. R., 11 All., 296, referred to.

Chhiddu *v.* Naubat, I. L. R., 24 All. 67

——— *Mitakshara — Succession — Question of priority between the son of the paternal uncle of propositus and his brother's grandson.*] *Held* that according to the Hindu law of the Mitakshara school the grandson of a brother is a nearer *sapinda* than the son of a paternal uncle. *Sambhoo Dutt Singh* v. *Jhootee Singh*, S. D. A., L. P., 1855, p. 382; *Rutcheputty Dutt Iha* v. *Rajunder Narain Rai*, 2 Moo., I. A., 133; *Kureem Chand Gurain* v. *Oodung Gurain*, 6 W. R. C. R., 158; *Oorhya Kooer* v. *Rajoo Nye*, 14 W. R. C. R., 208; *Bhyah Ram Singh* v. *Bhyah Ugur Singh*,

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13 Moo., I. A., 373; and *Suba Singh* v. *Sarfaraz Kunwar*, I. L. R., 19 All., 214 referred to. *Suraya Bhukta* v. *Lukshminarasmma*, I. L. R., 5 Mad., 291, dissented from.

Kalian Rai *v.* Ram Chandar, I. L. R., 24 All. ... 128

HINDU WIDOW, *See* Act No. I of 1894, sections 31 and 32 ... 189

——— *See* Hindu law 160, 547

INJUNCTION—*Maxim—Cujus est solum ejus est usque ad cœlum—Question whether common law rights of owner can be limited by religious prejudices of neighbours.*] Certain plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a pipal tree overhanging their property. The pipal tree grew in the enclosure of a temple, and the resistance was based on the ground that the tree was an object of veneration to Hindus, and that the lopping of its branches would be offensive to the religious feelings of the Hindu community.

Held that the plaintiffs were entitled to the injunction prayed for, and that the fact that the plaintiffs' action might cause annoyance to a large number of Hindus, was not a sufficient ground for cutting down the well recognized common law rights of an owner of property.

Behari Lal *v.* Ghisa Lal, I. L. R., 24 All. 499

JOINT HINDU FAMILY, *See* Hindu Law ... 67, 82, 160, 211, 459 and 483

JURISDICTION, *See* Act No. XVIII of 1879, sections 6 and 8 ... 348

——— *See* Act No. XII of 1881, sections 42, 95, 206 ... 517

——— (Civil and Revenue Courts) *See* Act No. XII of 1881, sections 93, 95 153

——— *See* Act No. IX of 1887, schedule ii, clause (18) ... 208

——— *See* Act No. XIV of 1891, section 8 13

——— *See* Criminal Procedure Code, section 188... ... 256

KUMAUN RULES, 27TH JULY, 1894, RULES 2 AND 11, *See* Act No. XVIII of 1879, sections 6 and 8 348

LAND-HOLDER AND TENANT—*Mortgage of holding by land-holder to tenant—Mortgagee's rights as tenant not thereby merged in his rights as mortgagee.*] The fact of a tenant's taking a mortgage of land comprised in his holding from his landlord does not of itself extinguish the tenancy by merging the rights of the tenant in those of the mortgagee. The effect of such a mortgage on the tenant rights would be merely that they would be in abeyance. When the landlord redeemed the mortgage, the parties would revert to their former position, and the landlord would not be entitled to get possession of the land except by ejecting the tenant in due course of law.

Kallu *v.* Diwan, I. L. R., 24 All. 487

——— *See* Act No. XII of 1881, section 56... 127

——— *See* Act No. XII of 1881, sections 42, 95, 206 487

"LEGAL NECESSITY," *See* Hindu Law 547

LEGAL REPRESENTATIVE, *See* Civil Procedure Code, sections 2, 372, 588(2) 532

LEGITIMACY, *See* EVIDENCE 445

LESSOR AND LESSEE, *See* Act No. XII of 1881, section 23 ... 465

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LETTER PATENT, SECTION 8—*Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor—Presentation by agent of a pardah-nashin woman—Civil Procedure Code, sections* 640, 404, 592.] Where an appeal *in formâ pauperis* by a *pardah-nashin* woman, who had sued as a pauper in the Court of first instance, was presented, not by an advocate, vakil or attorney of the Court, nor by the appellant in person, but by her duly authorized agent, it was *held* that this was a good presentation, section 8 of the Letters Patent notwithstanding. *Shiam Karan* v. *Raghunandan Prasad*, Weekly Notes, 1900, p. 96, distinguished.

Wazir-un-nissa *v.* Ilahi Bakhsh, I. L. R., 24 All. ... 172

LIMITATION — *Construction of Government order. — Release of nazul property.*] The proprietary right in the site of a bazar, and interests in the houses thereon, were disputed between the zamindar claiming them, and the resident occupiers, whose rights by agreement were to be determined by the decision in the case of the defendant who was one of them. In 1879 the Government released the bazar from the nazul, it having been entered in the District Register of that property in 1860.

In the written order of Government sanctioning the withdrawal of the entry in the register there were words as to the effect of which the Courts below differed; the Court of first appeal holding that the release was to the zamindar, the Court of second appeal holding that the occupiers of the houses were severally made proprietors of them. The words were "as the occupiers appear to have all along exercised proprietary rights without question of their power to do so, it is now too late to disturb their status."

Held, that the intention of the Government, as shown, was merely to annul the entry in the Register, and to restore the rights which existed when the entry had been erroneously made. More importance was attached to the act of the Government than to the words used in their order. The effect was a disclaimer of title and a release to those who would have been entitled but for the confiscation by the act of State of 1858; thus following out the policy at the general settlement of Oudh lands. There was no intention to benefit one party more than the other, or to confer title upon either as against the other, in this release.

Held, also, that limitation did not apply. Before the annexation of the province there was no limitation causing either bar of suit or title to accrue. So long as the ownership was in the Government, and till the release, neither party had any interest to enforce. The earliest date from which limitation could commence was the date of the release.

On questions not yet disposed of below as to the titles of the parties irrespectively of those supposed to have been conferred by the order of 1879, and as to the claim in regard to the materials, the suit, was remanded to the first Court for trial upon issues.

An official report forwarded with the application for sanction of the release of the property from the nazul was referred to as showing the materials which the Government had before them for deciding to act as they did.

Maqbul Husain *v.* Lalta Prasad 1

———— *See* Act No. XV of 1877, schedule II, articles 10, 120, 144 17

———— *See* Act No. XV of 1877, schedule II, article 14 ... 467

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LIMITATION, *See* Act No. XV of 1877, schedule II, articles 23, 24, 25 and 36 368

——— *See* Act No. XV of 1877, schedule II, articles 29 and 42 146

——— *See* Act No. XV of 1877, schedule II, article 89 ... 27

——— *See* Act No. XV of 1877, schedule II, article 119 ... 195

——— *See* Act No. XV of 1877, Schedule II articles 178 and 179 300

——— *See* Act No. IV of 1882, sections 86 and 87 ... 542

——— *See* Evidence 294

——— *See* Pre-emption 218

——— *See Res judicata* 282

MAHARASHTRA SCHOOL OF HINDU LAW, *See* Hindu law ... 472

MAINTENANCE. *See* Hindu law 160

"MALICE," *See* Suit for damages for malicious prosecution ... 363

MALICIOUS PROSECUTION. Suit for damages for ——, *See* S. V. Suit 317

MAXIM—*Cujus est solum, ejus est usque ad cœlum*—*See* Injunction 499

——— *Qui facit per alium facit per se, See* Act No. IV of 1882, sections 59 and 123 319

MERGER. Doctrine of—*See* Land-holder and tenant 487

MESNE PROFITS, *See* Act No. 1 of 1877, section 9 501

——— *See* Civil Procedure Code, sections 211 ... 376

——— *See* Civil Procedure Code, section 533 361

MISCHIEF. *See* Act No. XLV of 1860, sections 426, 298, 504 ... 155

MISJOINDER, *See* Civil Procedure Code, sections 31 and 44 ... 358

——— of causes of action, *See* Civil Procedure Code, sections 43, 44 553

MITAKSHARA, *See* Hindu Law ... ... 67, 82 and 128

MORTGAGE—*Suit for redemption— Stipulation for interest until principal paid off—Mortgagee in possession and in receipt of rents and profits—Reduction of mortgagee's security by acts beyond mortgagor's control—Acquiescence of mortgagee.*] The plaintiff mortgaged to the defendant twelve villages, and stipulated in the mortgage deed that "until delivery of possession of the aforesaid villages I shall pay interest at the rate of 2 per cent. on the mortgage money," and that "until I pay up the Rs. 5,600 on account of principal with interest to the very last pie the mortgagee shall continue in possession and occupation of the villages." Possession of the villages was given to the mortgagee at the time of the execution of the mortgage; but a reduction in the number of villages in his possession was caused by a grant by the native Government in 1853, and settlements in 1858 and 1864 in favour of other persons. By a lease executed at the same time as the mortgage some of the villages were leased to the plaintiff, who thus became the tenant of the mortgagee, and paid rent in lieu of interest. *Held* in a suit for redemption that the interest referred to in the mortgage deed was only interest until possession was given of the mortgaged property: the mortgagee after possession took the rents and profits instead of interest, and the plaintiff was entitled to redemption on payment of the principal sum of Rs. 5,600 only.

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Held also that no difference to this result was caused by the reduction in the number of villages held by the mortgagee, which did not constitute a failure on the part of the mortgagor to secure to the mortgagee possession of the mortgaged property such as entitled the mortgagee to claim interest in lieu of the rents and profits of those villages of which he was so dispossessed. The settlements were final as to the ownership of the mortgaged property, and the mortgagee having brought no suit, as he might have when his security became diminished, must be taken to have acquiesced in his dispossession.

Partab Bahadur Singh *v.* Gajadhar Bakhsh Singh, I. L. R., 24 All. 521

MORTGAGE—*Usufructuary mortgage of zamindari and sir—Loss by mortgagor of proprietary rights—Mortgage to take effect against ex-proprietary rights of mortgagor—Mortgagor not entitled to relinquish ex-proprietary rights to zamindar — Act No. XII of* 1881 *(N.-W. P. Rent Act), section* 31.] A zamindar, having mortgaged by way of usufructuary mortgage his zamindari, together with his sir land, lost his zamindari rights and became an ex-proprietary tenant of the sir.

Held that the usufructuary mortgage did not become ineffectual, but took effect as a mortgage of the ex-proprietary rights. *Moody* v. *Mathews*, 7 Ves., 174; *Hughes* v. *Howard*, 25 B., 575; *Trumper* v. *Trumper*, L. R., 8 Ch., 870; *Khiali Ram* v. *Nathu Lal*, I. L. R., 15 All, 219, and *Sukru* v. *Tafazzul Husain Khan*, I. L. R., 16 All., 398, referred to.

Held also that in such a case as above the mortgagor, ex-proprietary tenant, could not, to the prejudice of the mortgagee, surrender to the zamindar his ex-proprietary interest. *Badri Prasad* v. *Sheo Dhian* (I. L. R., 18 All., 354) referred to.

Sham Das *v.* Batul Bibi, I. L. R., 24 All. 538

———— *See* Act No. IV of 1882, sections 59 and 123 319

———— *See* Act No. IV of 1882, sections 60, 92, and 93 .. 44

———— *See* Act No. IV of 1882, sections 67, 85, 99 149

———— *See* Act No. IV of 1882, section 74 185

———— *See* Act No. IV of 1882, sections 83 and 84 461

———— *See* Act No. IV of 1882, sections 88 and 89 479

———— *See* Civil Procedure Code, section 244 209

———— *See* Hindu law 211, 459, 483

———— *See* Land-holder and tenant 487

———— *See* Pre-emption 514

———— by conditional sale, *See* Act No. XV of 1877, schedule II, articles 10, 120, 144 1

———— by conditional sale, *See* Pre-emption 493

"MOVABLE PROPERTY," *See* Act No. XV of 1877, Schedule II, article 89 27

MUHAMMADAN LAW—*Waqf—Waqf of money held to be valid.*] *Held* that according to the Muhammadan law a waqf of movable property may be validly constituted. *Fatima Bibee* v. *Ariff Ismailjee Bham*, 9 C. L. R., 66 dissented from.

Abu Sayid Khan *v.* Bakar Ali, I. L. R., 24 All.... ... 190

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MUHAMMADAN LAW—*Shias—Waqf—Invalid waqf—Condition suspending operation of waqf-namah—Condition that waqf-namah should not take effect until registration.*] According to the Shia law it is one of the essential conditions precedent to the validity of a waqf that it should not be rendered contingent upon any future event, whether such event is likely or possible to occur, or even when it is certain to occur, such as the beginning of the next month, or the occurrence of the death of the waqf.

Hence when a Muhammadan of the Shia sect executed a waqf-namah in which it was provided that "this deed of waqf shall come into force from the date of its registration, no one shall be at liberty to take any objection, etc.," it was *held* that this condition was repugnant to the doctrine of the Shia law and the waqf was invalid. *Agha Ali Khan* v. *Altaf Husain Khan*, I. L. R., 14 All., 429 referred to.

Syeda Bibi *v.* Mughal Jan, I. L. R., 24 All. 231

———*Waqf—Shias—Essentials of a valid waqf according to the Shia law—Illusory dedication.*] One Muhammad Faiyaz Ali Khan a Muhammadan of the Shia sect, on the 7th of May, 1878, caused to be drawn up an instrument, by which he purported to make a waqf of the whole of his property. This instrument, beyond the bare statement that the property was constituted waqf, contained no specification of the purposes to which it was to be devoted. The settlor, however, after naming himself as the mutawalli of the waqf property during his life, went on to declare that the precise purposes of the dedication, and the mode in which the waqf property was to be managed would be set forth in a will which the settler was about to execute. But he added that the future will should always be acted on after his death, and so far as he himself was concerned laid down no rules for the management of the waqf property. On the 11th of May, 1878, the instrument above referred to and the will were executed by Faiyaz Ali Khan, and they were both registered on the 13th of the same month. The will provided for the succession to the office of mutawalli after the death of the testator, and laid down certain "rules of practice" to be observed with reference to the management of the endowed property. These rules of practice for the most part merely enjoined upon the mutawalli the keeping up of the religious observances which had been usually performed by the testator in his lifetime, and which were no more than such ceremonies as would ordinarily be performed by a pious and well-to-do Muhammadan of the sect to which the testator belonged. The tenth paragraph of the rules of practice did, however, provide that should the settlor have left any debts "the succeeding mutawalli should pay them *first of all* by curtailing all the expenses." The former of these two documents, while reciting that the waqf was created "in order to obtain benefit in the next world," also provided that the property dealt with thereby should "under no circumstances be made the subject of inheritance," and otherwise clearly indicated that the object of the waqf was very largely the preservation of the property in the hands of the settlor's descendants. After the execution of these documents the settlor never had himself recorded in the Revenue records as mutawalli instead of proprietor, and his son, the succeeding mutawalli, was recorded as proprietor and not as mutawalli.

Held by Stanley, C.J., that the so-called waqf-namah was invalid, for the reason chiefly that there was therein no specific dedication to religious or charitable uses, such as was necessary to constitute a valid waqf. The subsequent will could not be prayed in aid to complete the transaction, inasmuch as under the Muhammadan law applicable to the Shia sect a waqf could not be created

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by will. It appeared, moreover, that the settlor's intention was to suspend the operation of the waqf-namah until after his death, which also was not permissible according to the Shia law. If the two documents could be read together, even then the waqf would be invalid, as it appeared that the dedication was not so much intended to satisfy pious or charitable objects as to secure the preservation of the donor's property for his family. *Agha Ali Khan* v. *Altaf Hasan Khan*, I. L. R., 14 All., 429; *Abdul Ganne Kasam* v. *Hussen Miya Rahimtulla*, 10 Bom. H. C. Rep., 7; *Mahomed Hamidullah Khan* v. *Lotful Huq*, I. L. R. 6 Calc., 744; *Pathukutti* v. *Avathalakutti*, I. L. R. 13 Mad., 66; and *Syeda Bibi* v. *Mughal Jan, Supra*, p. 231; S. C., Weekly Notes, 1902, p. 32, referred to.

Per BURKITT, J.—The waqf-namah and the will could be read together as constituting but one transaction, which was not therefore, open to the objection of being a testamentary waqf, inasmuch as the dedication was made by the waqf-namah, and the will did not purport to make any testamentary disposition in favour of the succeeding mutawalli, but merely recited the dedication made in the waqf-namah, and then went on to lay down certain rules as to the management of the property. But even so the waqf was invalid as not being a real and substantial dedication to religious or charitable purposes, but under the guise of such dedication an attempt to preserve the property intact for the benefit of the settlor's family. Apart from this, the provisions of the tenth paragraph of the rules of practice referred to above as to the payment of the settlor's debts by the succeeding mutawalli were of themselves sufficient to invalidate the waqf. It was further open to considerable doubt whether under the circumstances of the case the settlor had ever taken such possession *as mutawalli* of the waqf property as is requisite under the Shia law.

Hamid Ali *v.* Mujawar Husain Khan, I. L. R., 24 All. ... 257

MUHAMMADAN LAW, *See* Pre-emption 119

MUNICIPAL BOARD. Bye-laws of——, *See* Act (Local) No. 1 of 1900, section 147 309

——————. Powers of ——*See* Act (Local) No. 1 of 1900, Sections 128*(c)* and 132 439

NAZUL PROPERTY, *See* Limitation 1

"ORDER," *See* Civil Procedure Code sections 2, 372 and 588(21) ... 342

PARTIES TO SUIT—*Practice—Suit by some only of several persons entitled to sue, the others being joined as co-defendants.*] Where out of several persons who apparently had a right to bring a suit as co-plaintiffs, some only appeared as plaintiffs and joined the others as co-defendants. *Held* that the suit ought not to have been dismissed merely because the plaintiffs failed to show that the persons whom they joined as co-defendants refused to appear with them as plaintiffs. *Pyari Mohun Bose* v. *Kedar Nath Roy*, I. L. R., 26 Calc., 409, followed. *Dwarka Nath Mitter* v. *Tara Prosunna Roy*, I. L. R., 17 Calc., 160, referred to.

Biri Singh *v.* Nawal Singh, I. L. R., 24 All. 226

PARTITION, *See* Hindu Law ... ... 67, 82 and 483

—————— of mahal. *See* Pre-emption 493

PAWNOR AND PAWNEE, *See* Act No. IX of 1872, section 176 ... 251

PAYMENT of money lent, *See* Act No. IV of 1882, sections 83 and 84 461

PLEADER. Enrolment of——, *See* Act No. XVIII of 1879, sections 6 and 8 348

PLEADINGS, *See* Practice 85

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POSSESSION—*Nature of interest in immovable property acquired by virtue of mere possession.*] A person in possession of land without title has an interest in the property which is heritable and good against all the world except the true owner, an interest which, unless and until the true owner interferes, is capable of being disposed of by deed or will, or by execution sale, just in the same way as it could be dealt with if the title were unimpeachable *Asher* v. *Whitlock*, L. R., 1. Q. B., 1, *Sundar* v. *Parbati*, I. L. R., 12 All., 51, and *Brindabun Chunder Rao* v. *Tara Chand Banerjee*, 20 W. R., C. R., 14, referred to.

Gobind Prasad *v.* Mohan Lal, I. L. R., 24 All. ... 157

———, *See* Evidence 294

PRACTICE—*Pleadings—Failure of plaintiff to establish case set up by him—Right to succeed upon facts found differing from those alleged.*] The plaintiff sued the defendant, alleging that the defendant was tenant of a certain house belonging to the plaintiff, that the tenancy had commenced some eleven years before suit, and that for the last three years the defendant had ceased to pay rent, and had recently denied the plaintiff's title.

The defendant denied that the plaintiff was the owner of the house or that he had leased it to the defendant. He pleaded also that he had been in adverse possession for more than twelve years.

The plaintiff failed to prove the allegation of tenancy set up by him, and it was not shown that the plaintiff had been in possession within a period of twelve years from the institution of the suit.

Held that, under the circumstances stated above, it being, on the failure of the plaintiff's case as to tenancy, for the plaintiff to prove that he had possession within twelve years, the plaintiff was not entitled to a decree.

Naiku Khan v. *Gayani Kuar*, I. L. R., 15 All., 186; *Ali Husain* v. *Ali Bakhsh*, Weekly Notes, 1889, p. 176, and *Balmakund* v. *Dalu*, Weekly Notes, 1901, p. 157, referred to.

Haji Khan *v.* Baldeo Das, I. L. R., 24 All. 90

———— *See* Act No. XIV of 1891, section 8 13

———— *See* Criminal Procedure Code, section 145 443

———— *See* Criminal Procedure Code, sections 435, 438 and 439... 346

———— *See* Parties to suit 226

PRE-EMPTION—*Mortgage—Mortgage money fraudulently overstated—Claim of pre-emption decreed at a lower figure—Suit by mortgagees against mortgagor to recover the difference.*] Din Bandhu mortgaged to Sheodihal and others certain property, and the mortgagor and the mortgagees for purposes of their own fraudulently agreed to over-state the consideration for the mortgage. One Shuhrat Singh then brought a pre-emption suit against the parties to the mortgage, and obtained a decree, which allowed him to take over the rights of the mortgagees upon payment of a sum much less than the consideration stated in the bond, which was found by the court to have been largely fictitious. The mortgagees, after the success of Shuhrat Singh's suit, sued the representatives of the mortgagor to recover from them the difference between the price paid by Shuhrat Singh and the consideration mentioned in the deed of mortgage. They based their suit mainly upon a stipulation in the deed, to the effect that if the mortgage money due to the mortgagees was in any way jeopardized, the mortgagees would be entitled to realize it with interest at 9 per cent. per annum, and partly upon general grounds of equity. *Held* that from no

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point of view were the plaintiffs entitled to succeed. The stipulation in the bond above referred to enured to the benefit of the pre-emptor, and since the plaintiffs had joined with the defendants in misrepresenting the amount of the consideration for the mortgage, they could not be allowed to take advantage of their own wrong.

Balbhaddar Nath *v.* Sheodihal, I. L. R., 24 All. ... 514

PRE-EMPTION—*Mortgage by conditional sale—Accrual of right of pre-emption when sale becomes absolute—Wajib-ul-arz—Partition of mahal.*] The wajib-ul-arz framed in 1883, of an undivided mahal consisting of several villages contained the following provision as to pre-emption:—"Should a sharer of any patti sell his share, he will sell it first to subordinate sharer: if they refuse to take it, then to sharers in the patti: and if they also do not take it, then to proprietors of the mahal: and in case of refusal by all the sharers before mentioned, he shall have power to transfer it to a stranger."

While this wajib-ul-arz was in force, namely, in 1890, certain property, to which its provisions applied, was mortgaged by a deed of conditional sale In 1844, after partition of the mahal, a new wajib-ul-arz was framed for the mahal in which the mortgaged property was situated, which also contained a similar record of the custom of pre-emption in the following terms:—"Should a sharer sell his share, he will sell it first to his subordinate sharers, afterwards to a sharer in the mahal, and in case of refusal, by the sharer in the mahal, to a sharer in the old mahal."

Held that the record as to the right of pre-emption being in both cases the record of a custom, and the provisions of the latter wajib-ul-arz being capable of application to the circumstances of the case, a right of pre-emption accrued to the share-holders in one of the other mahals into which the original mahal had been divided, upon the mortgage by conditional sale becoming an absolute sale in favour of a stranger

Alu Prasad v. *Sukhan*, I L. R., 3 All, 610, followed. *Bachan Rai* v. *Nand Kishore Rai*, I. L. R., 14 All., 341 and *Gaya Bharthi* v. *Lakhnath Rai*, I. L. R., 20 All., 103 distinguished.

Ran Bahadur Rai *v.* Parmeshar Bharthi, I. L. R., 24 All. ... 493

———*Muhammadan Law—Mortgage by a successful pre-emptor of the pre-empted property to a stranger—Pre-emptive rights of decree-holder not thereby destroyed.*] The plaintiff in a pre-emption suit having obtained a decree for possession, in order to provide the means of paying the pre-emptive price mortgaged the property, the subject of the suit, to a stranger. *Held* that, whatever rights the mortgagee to a stranger might or might not give rise to in the future, the successful plaintiff did not by that transaction forfeit the fruits of her decree. *Rajjo* v. *Lalman*, I. L. R., 5 All., 180 distinguished. *Ram Sahai* v. *Gaya*, I. L. R., 7 All., 107 referred to.

Bela Bibi *v.* Akbar Ali, I. L. R., 24 All. 119

———*Wajib-ul-arz—Sale of zamindari share and appurtenances—Indigo factory not appurtenant—Court fee—Act No. VII of 1870 (Court Fees Act), section 7, sub-section V(b)—"Land"—Valuation of suit—Limitation—Civil Procedure Code, section 54.*] When a Court fixes a time under clause *(a)* or *(b)* of section 54 of the Code of Civil Procedure, it must be a time within limitation, and section 54 does not give a Court any power to extend the ordinarily prescribed period of limitation for suits. *Jainti Prasad* v. *Bachu Singh*, I. L. R., 15 All., 65, followed. *Moti Sahu* v. *Chhatri Das*, I. L. R., 19 Calc., 780, referred to.

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On the sale of a share in zamindari property, buildings, such as indigo factories, will not ordinarily pass to the vendee along with the zamindari share sold, unless there is distinct evidence of the user of such buildings as part and parcel of, or as appurtenant to, the zamindari. *Abu Husan* v. *Ramzan Ali*, I. L. R., 4 All., 381 *Bankey Lal* v. *Damodar Das*, Weekly Notes, 1900, p. 31, and *Salig Ram* v. *Debi Parshad*, 7 N.-W. P. H. C. Rep., 38, referred to.

The term "land" as used in the Court Fees Act, 1870, does not include buildings. A claim therefore for pre-emption of an indigo factory, although the site of the factory may be land paying revenue to Government, must be valued, and Court fees paid thereon, according to the value of the buildings constituting the factory, and not according to the value of the site. Such buildings as constitute an indigo factory would fall within the meaning of the term "houses" as used in the Court Fees Act.

Durga Singh *v.* Bisheshar Dayal, I. L. R., 24 All. ... 218

PRE-EMPTION, *See* Act No. XVIII of 1876, Chapter II 420

——— *See* Act No. XV of 1877, schedule II, articles 10, 120, 144 17

——— *See* Act No. XV of 1877, schedule II, articles 178 and 179 300

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———. Right of ——, *See* Act No. XLV of 1860, sections 147 and 96 *et seqq.* 298

PRIVY COUNCIL, Practice of — *See* Civil Procedure Code, sections 596, 600 174

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"REASONABLE AND PROBABLE CAUSE," *See* suit for damages for malicious prosecution 363

RECEIPTS, *See* Act No. II of 1899, sections 35*(b)* and 42... ... 374

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——— *See* Act No. IV of 1882, sections 88 and 89 ... 479

——— *See* Mortgage 549

REGISTRATION, *See* Act No. III of 1877, sections 73, 74, 75, 76, and 77 402

"RELEASE", *See* Act No. II of 1899, schedule I, articles 23, 55, 62*(e)* 372

RELINQUISHMENT of part of cause of action, *See* Res judicata . 429

——— of part of claim, *See* Civil Procedure Code, section 53 ... ...

RES JUDICATA—*Civil Procedure Code, section* 13, *Explanation II —Omission to set up mortgage bond as a defence in former suit —Subsequent suit on mortgage bond—Civil Procedure Code, section* 43—*Relinquishment of part of cause of action*] Where, to a suit by a mortgagee on a mortgage bond of certain property, a prior mortgagee of the same property is made a party and omits to set up his prior charge and claim to have it redeemed, a suit subsequently brought by him for that purpose is barred by explanation II of section 13 of the Civil Procedure Code.

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In the same way, if, being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead.

Quære—Can a mortgagee who has several mortgages on the same property treat them, with respect to the provisions of section 43 of the Civil Procedure Code, as separate causes of actions or must he bring one suit on all his mortgages?

Sri Gopal *v.* Pirthi Singh, I. L. R., 24 All. 429

RES JUDICATA—*Execution of decree—Principle of res judicata as applied to execution proceedings—Succession certificate—Act No VII of* 1889 *(Succession Certificate Act) section,* 4.] The principle of *res judicata* applies to prevent parties raising a second time in the same suit, or in the same execution proceedings, an issue which in that suit, or in the execution proceedings in the suit, had been previously determined.

The principle of *res judicata* does not depend for its application upon the question whether the decision which is to be used as an estoppel was a right decision or a wrong decision in law or on facts. A defendant-respondent cannot avoid the application of the principle of *res judicata* by saying that he did not appear at the trial of the suit, and a plaintiff who has got an *ex parte* decree on proof of his title or on failure of the defendant to prove a defence, the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not appear in Court to protect his own interest. *Ram Kirpal* v. *Rup Kuari*, I. L. R., 6 All., 269, referred to.

Behari Lal *v.* Majid Ali, I. L. R., 24 All. 138

——— *Execution of decree—Limitation.*] Although the execution of a decree may have been actually barred by time at the date of an application made for its execution, yet if an order for execution is made by a competent Court, having jurisdiction to try whether such execution is barred by time or not, such order, although erroneous, must, if unreversed, be treated as valid.

An application for execution of a decree was struck off on the 15th of January, 1894. The next application for execution was not made until the 29th of May, 1897. Notice of this application was served on the judgment-debtors, and they filed objections, but on the day fixed for hearing failed to support them, and they were dismissed. The application for execution was, however, ultimately struck off by reason of the non-payment of process fees by the decree-holders. *Held* that it was not open to the judgment-debtors on a subsequent application for execution being made to plead limitation in respect to the application of the 29th of May, 1897, as a bar to the execution of the decree. *Mangul Pershad Dichit* v. *Grija Kant Lahiri Chowdhry*, L. R., 8 I. A., 123, *Behari Lal* v. *Abdul Majid*, Weekly Notes, 1897, p. 29, *Lakshmanan Chetti* v. *Kuttayan Chetti*, I. L. R., 24 Mad., 669, *Bholanath Dass* v. *Prafulla Nath Kundu Chowdhry*, I. L. R., 18 Calc., 122 and *Dhonkal Singh* v. *Phakkar Singh*, I. L. R., 15 All., 84 referred to. *Tileshar Rai* v. *Parbati*, I. L. R., 15 All., 198 and *Onkar Singh* v. *Mohan Kuar*, Weekly Notes, 1898, p. 96, distinguished.

Sheoraj Singh *v.* Kameshar Nath, I. L. R., 24 All. ... 282

——— *See* Act No. 1 of 1872, section 44 242

——— *See* Act No. XII of 1881, sections 93, 95 ... 153

——— *See* Act No. IV of 1882, sections 60, 92, and 93 ... 44

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REVISION, *See* Criminal Procedure Code, section 145 443

——— *See* Criminal Procedure Code, sections 435, 438 and 439 ... 346

——— High Court's powers of——, *See* Statutes—— 24 and 25 Vic., Cap civ, section 15 315

RIOT, *See* Act No. XLV of 1860, section 147 ... ... 298, 143

SECURITY FOR GOOD BEHAVIOUR, *See* Criminal Procedure Code, sections 110, *et seqq*; 437 ... ... 148, 471

——— for keeping the peace. *See* Criminal Procedure Code, sections 107 (2) 192 151

SET-OFF, *See* Civil Procedure Code, section 246 481

SHIAS, *See* Muhammadan law 257

SMALL CAUSE COURT SUIT, *See* Act No. IX of 1887, schedule II, clause (18) 208

STAMP, *See* Act No. II of 1899, sections 35*(b)* and 42 374

——— *See* Act No. II of 1899, schedule I, articles 23, 55, 62*(e)* ... 372

STRIDHAN, *See* Hindu Law ... ... 67 and 82

STATUTES—24 AND 25 VIC. CAP. CIV., SECTION 15—*Criminal Procedure Code, sections* 145, 435, 439—*Order of Magistrate in case of a dispute relating to immovable property — High Court's powers of revision.*] *Held* that the High Court cannot exercise revisional powers in respect of proceedings under Chapter XII of the Code of Criminal Procedure unless in a case were the Magistrate has acted without jurisdiction. *Doulat Koer* v. *Rameswari Koeri*, I. L. R., 26 Calc., 625, followed.

Nathu Mal. In the matter of the petition of——, I. L. R., 24 All. 315

SUCCESSION, *See* Hindu law 472

SUIT Valuation of——, *See* Act No. XII of 1887, section 24 ... 381

——— valuation of—— *See* Pre-emption 218

——— for compensation for injury caused by an injunction wrongfully obtained. *See* Act No. XV of 1877, schedule II, articles 29 and 42 ... 146

——— for compensation for libel or slander, *See* Act No. XV of 1877, schedule II, articles 23, 24, 25 and 36 368

———for compensation for wrongful seizure of movable property under legal process. *See* Act No. XV of 1877, schedule II, articles 29 and 42 146

——— for damages for malicious prosecution — *Plaintiff not prosecuted by defendant, though named by the defendant as having some connection with an assault made upon him— Prosecution initiated by Magistrate* suo motu.] One Dudhnath Kandu lodged a complaint before a Magistrate that he had been assaulted and severely beaten by four persons whom he named. He subsequently added the name of a fifth person as one of his assailants. When required to make a statement upon oath in support of his complaint, he stated *inter alia*, that in the course of the assault one Mathura Prasad came from behind and called out "beat." Thereupon the Magistrate issued a warrant against Mathura Prasad also as well as against the persons named in the complaint. Mathura Prasad was acquitted, and thereafter brought a suit for damages for malicious prosecution against the complainant. *Held* that the plaintiff had never been prosecuted by the complainant, but that his prosecution was due to the action of the Court *suo motu*, and that the plaintiff had no cause of action against the defendant

Dudhnath Kandu v. Mathura Prasad, I. L. R., 24 All. ... 317

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SUIT for damages for malicious prosecution—"*Malice*"—"*Reasonable and probable cause.*"] "Reasonable and probable cause" in connection with actions for damages for malicious prosecution may be defined to be an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed. *Hicks* v. *Faulkner* L. R., 8 Q. B. D., 157, referred to.

"Malice" in a similar connection is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. *Mitchell* v. *Jenkins* 5 B. and Ad., 595, referred to.

The mere absence of reasonable and probable cause does not of itself justify the conclusion as a matter of law that an act is malicious. It is not identical with malice, but malice may, having regard to the circumstances of the case, be inferred from it. *Gajpathi Rau* v. *Narsing Rau Garu* 6 Mad., H. C. Rep., 85, referred to.

Bhim Sen *v.* Sita Ram, I. L. R., 24 All. 363

—— for damages for malicious prosecution, *See* Act No. XV of 1877, schedules II, articles 23, 24 25 and 36 368

—— for partition, *See* Act No. XII of 1887, section 24 381

—— for specific enforcement of an award. *See* Award 164

—— in formâ pauperis, *See* Civil Procedure Code, sections 25 and 403 *et seqq.* 356

—— to compel registration, *See* Act No. III of 1877, sections 7 3, 74, 75. 76, and 77 402

SUMMONS. Service of——, *See* Civil Procedure Code, sections 80, 108 302

SURETY, *See* Act No. IX of 1872, sections 134 and 137 504

TENDER, *See* Execution of decree 85

TITLE. *See* Act No. I of 1872, section 32, clauses (5) and section (6) 94

TRANSFER, *See* Civil Procedure Code, section 25 304

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—— *See* Criminal Procedure Code, sections 107 (2), 192 ... 151

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